opinion of the United States Court for the Western District of Washington, Northern Division, is reported in 180 F. Supp. 954 (W. Wash. 1960) and is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 30, 1961. A copy of such judgment is attached hereto as Appendix C. Petitioner's time within which to file and serve a petition for rehearing was extended to and including August 15, 1961, by an order dated July 18, 1961, made and entered by the United States Court of Appeals for the Ninth Circuit. Petitioner filed a petition for rehearing on August 14, 1961, which petition was denied on August 28, 1961. A copy of the Order Denying Petition for Rehearing is attached hereto as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. May a labor union (and its wholly owned profit corporation) combine and agree with an employer, one of two competitors in a market area, to organize and maintain a group boycott of the other competitor by the customers of such other competitor without violating Section 1 of the Sherman Act, even if it is assumed that such combination and agreement is not coupled with the exclusionary intent requisite to a Sherman Act Section 2 violation?

2. May one of two daily newspaper publishing companies in a market area, which is seeking to force its competitor to merge or consolidate with it, and a labor union (and its wholly owned corporations), which is seeking to deprive the other competitor of its circulation and advertising patrons in order to force acceptance of a labor contract,

lawfully combine and agree to deprive such competitor of its patrons by group boycotts and other joint activity without violating Sections 1 and 2 of the Sherman Act, merely because each was motivated by a separate, independent purpose?

3. Is the Robinson-Patman Act, which was enacted to reach competitive injury in its incipiency, to be construed as denying a claim for relief to one of two competitors in a market area which loses patrons because of its competitor's price discriminations, merely because such injured business concern remains the larger business concern in its market area?[1]

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act (15 U.S.C., sections 1, 2); and Sections 2 and 4 of the Clayton Act, as amended (15 U.S.C., sections 13 and 15). These statutes are printed and attached to this petition as Appendix E.

STATEMENT OF THE CASE

This action was brought by petitioner for treble damages resulting from respondents' alleged violations of Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. sections 1 and 2); and Section 2 of the Clayton Act (38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C., section 13) commonly referred to as the Robinson-Patman Act.

Since November 1947, petitioner has been engaged in the business of publishing The Tri-City Herald, a daily newspaper distributed throughout a market area in the south-

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1. At the threshold of this question is the subsidiary question of whether the Court of Appeals properly may accept the trial court's recitation of the statutory language of the Robinson-Patman Act as a finding adverse to the petitioner on the requisite competitive injury, especially where it appears that the trial court had erroneously concluded that there were no price differences (*i.e.*, price discriminations).

eastern part of the State of Washington known as the Tri-City Area. Respondent Columbia Basin Publishers, Inc. commenced publishing the Columbia Basin News, the only other daily newspaper published in the Tri-City Area, in March 1950.

The other respondents are Parish and Bryce, organizers and officers of Columbia Basin Publishers, Inc., the International Typographical Union (ITU), local unions affiliated with the ITU, representatives of such unions, and profit corporations organized and controlled by the ITU.

Petitioner alleged that respondents restrained trade and commerce in the daily newspaper publishing business in violation of Section 1 of the Sherman Act by combining, agreeing and conspiring to cooperate, among other things, in organizing and maintaining a group boycott of petitioner's business by circulation and advertising patrons. (R. 26-27.)[2] Petitioner also alleged that respondents combined, conspired and agreed either to force petitioner out of the daily newspaper business or to force petitioner to merge with respondent Columbia Basin Publishers, Inc. in violation of Section 2 of the Sherman Act. (R. 8-51.) Further, petitioner charged that repondents had violated the Robinson-Patman Act (Section 2 of the Clayton Act) by discriminating in price in the sale of newspaper advertising. (R. 8-51.) The action was tried without a jury and the trial court rendered a judgment in favor of respondents. That judgment was affirmed by the Court of Appeals for the Ninth Circuit. (Appendix C.)

On appeal, petitioner did not quarrel with the evidentiary facts found by the trial court with but two general excep-

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2. As used herein, the abbreviation "R." refers to the record which was printed in the Court of Appeals; the abbreviation "Tr." refers to the record which was reproduced in the Court of Appeals by Recordak process.

tions which were: (1) the conclusionary finding that respondents had no intent and purpose to put petitioner out of business, in violation of Section 2 of the Sherman Act, and, (2) the finding that there was no discrimination in prices charged by the News.[3]

The evidentiary findings of the court pertinent to this petition are as follows:

The court found that the publication of a daily newspaper by petitioner was a success from its inception in 1947. However, because petitioner was building into a rapidly expanding market, problems of financing existed. Respondent Parish was aware of such problems and in 1949 attempted to purchase a controlling interest in petitioner's business. The court found that Parish was aware of the tremendous possibilities of the Tri-City Area, the relative inexperience of the petitioner's management as contrasted with Parish's wide experience, and the financial problems of Scott Publishing Co., Inc. The court further found that Parish advised petitioner's officers at a meeting in 1949 of these matters and, when petitioner would not sell its business to Parish on his terms, that Parish stated that he would start a newspaper in the Tri-City Area to compete with them [petitioner's officers] and they would end up by having to sell their newspaper to Parish at 5c on the dollar. (Appendix B, p. 30.)

Failing in his efforts to obtain petitioner's newspaper business, Parish organized the Columbia Basin Publishers,

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3. Although petitioner and respondents filed and served comprehensive proposed findings of fact and conclusions of law as requested by the trial court, the trial court did not separately state its findings of fact and conclusions of law. Rather, the trial court filed an opinion which provided that it constituted the Court's findings of fact and conclusions of law.

Inc. and commenced publishing a weekly newspaper in the Tri-City Area.

In early 1950, representatives of Local 831 of the International Typographical Union commenced negotiations with representatives of the Scott Publishing Co., Inc. Negotiations broke down on March 3, 1950, and the Union members ceased working on that date. The trial court found "that both the Union representatives and the Scott Publishing Company negotiated in good faith on both sides but were unable to reach an agreement." (Appendix B, p. 33.) Parish informed the Union that a strike against The Tri-City Herald would be his signal to convert his biweekly newspaper to a daily newspaper and he did so in March 1950.

The financing for the Columbia Basin News which Parish had anticipated did not materialize and within a few months, after March 1950, Parish discussed with ITU representatives the possibilities of obtaining funds from that organization. The admitted objective of Parish and Bryce from the outset was to force a merger of The Tri-City Herald and the Columbia Basin News. (Pl. Exs. 102, 73, 101, 138, 86; Tr. 469-71, 474-75, 1507-08, 1213-14, 960.) The ITU was aware of Columbia Basin News' objective of merger. (Pl. Ex. 102.) Likewise, the ITU wanted to take all of the revenue it could from The Tri-City Herald unless petitioner signed the contract proposed by the ITU. (Appendix B, p. 36.) The marriage contract of this alliance is reflected in a report to the ITU dated September 5, 1950, by an ITU expert on newspaper operations. In this report which was adopted, the ITU expert recommended that money be advanced to Columbia Basin Publishers, Inc., "in amounts equal to their expanded efforts to beat our opponent." Thereafter, and continuing until the time of trial, the ITU granted moneys to the Columbia Basin News in the amount of

approximately $2,000,000 as the losses of the News mounted. (Tr. 7155.)[4]

In addition to the financing, the ITU supplied equipment to the Columbia Basin News. Eventually, the ITU's wholly owned profit corporation, Unitypo, Inc., organized the respondent profit corporation, Howard Parish and Associates, Inc., which furnished a building "rent free" to the Columbia Basin News. (Appendix B, p. 46.) The uncontradicted evidence reflects many meetings down through the years between representatives of the Columbia Basin News and the Union representatives for the purpose of planning joint activities directed toward cutting down the circulation and advertising revenue of The Tri-City Herald.[5] (Tr. 2103-04,

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4. There can be no contention in the face of the record that these grants were legitimate business transactions. Throughout the years that "loans" were being made to the Columbia Basin News by Unitypo the losses continued to mount, reaching the high of $218,000 for the one year 1957-1958, as disclosed by the following table:

LOSSES OF COLUMBIA BASIN NEWS FROM NEWSPAPER OPERATIONS 1949 TO 1959 (PL. EX. 161)

Period	Amount
Aug. to Oct. 1949	$ 10,121.92
Aug. 1, 1949 to July 31, 1950	76,643.66
Aug. 1, 1950 to July 31, 1951	101,833.00
Aug. 1, 1951 to July 31, 1952	98,869.60
Aug. 1, 1952 to July 31, 1953	138,676.31
Aug. 1, 1953 to July 31, 1954	143,343.96
Aug. 1, 1954 to July 31, 1955	138,948.31
Aug. 1, 1955 to July 31, 1956	179,011.43
Aug. 1, 1956 to July 31, 1957	160,151.18
Aug. 1, 1957 to July 31, 1958	218,883.44
Aug. 1, 1958 to June 30, 1959 (11 months)	157,335.07

5. Illustrative of this joint activity is plaintiff's Exhibit 84, which is a letter written by Parish (one of the newspaper respondents) which states:

> "Marvick [Union representative] was in town last week and we worked out some plans with him to fight the Tri-City. I think we will be able to cut down the circulation of the Herald and help ourselves. We are going to try to get the women working for us against the Tri-City Herald. The women will do a lot more work than men will in this kind of a fight. They can help both in subscriptions and advertising accounts."

2111, 2115; Pl. Exs. 24, 25, 33, 39, 60, 61, 84, 102, 114, 72, 74, 75, 76, 137, 188, 195, 223, 243, 71 and 497.) Pursuant to a written agreement between Columbia Basin Publishers, Inc. and Unitypo, Inc., concerning further financing, the newspaper respondents submitted detailed reports of operations to Unitypo. (Pl. Ex. 101.) Supplemental agreements provide that the officers and directors of Columbia Basin Publishers, Inc. submitted their resignations and thereafter continued in office at the grace of the Union.[6]

The trial court found that the newspaper respondents were interested in getting all the assistance possible from the Union respondents in obtaining the circulation and advertising business of petitioner and that the Union respondents desired to exert economic pressure against petitioner by causing a loss of business and revenue in any and every way they could in order to force petitioner to meet the Union's terms in a labor agreement. The court found that the Union respondents and the newspaper respondents cooperated in depriving the petitioner of its circulation and advertising revenue.[7]

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6. Secrecy was a vital element in the joint operation of the Columbia Basin News by the respondents, who actively concealed their relationships from business people in the Tri-City Area, from the employees of the News, from the national publishers' representatives of the News and, in the beginning, from the membership of Local 831. (Pl. Exs. 57, 92, 46; Tr. 482, 507-509; Pl. Ex. 102; Tr. 1068, 1058-1064, 1517, 1777 78, 1599, 2413-22, 2431, 2435-36; Pl. Exs. 75, 190, 240; Tr. 2805, 5853.)

Furthermore, Parish actively concealed from the Audit Bureau of Circulations (Stip. Tr. 1057-59; Pl. Ex. 97) and the Post Office Department. (Pl. Ex. 437) the interest of the ITU and Unitypo in the News.)

7. The trial court found as follows:

"The publishers of the News were likewise happy to take every advantage possible of the situation existing between Local 831 and the Tri-City Herald. The Union on the one hand was interested in exerting economic pressure against Scott Publishing Company by causing a loss of business and revenue in any

The evidence which supports the trial court's finding of cooperation between the two groups of respondents, includes the following:

(1) *Joint Union and News Program for Cancellation of Subscriptions to the Herald.*

Commencing March 4, 1950, the respondents worked together to reduce the circulation of The Tri-City Herald and to increase the circulation of the Columbia Basin News. (Pl. Ex. 176.) Members of Local 831 were instructed to obtain cancellations to the Herald and to turn over such cancellations of subscriptions to the News. (Tr. 240-41, 6237-38; Pl. Ex. 11; Def. Ex. 360; Pl. Ex. 40; Tr. 659.) The News employees then contacted such persons and attempted to sell the News in place of The Tri-City Herald. Hagman, an employee of the News, was instructed by Parish to cause an employee of the News to call at Central Labor Headquar-

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and every way it could in order to force Scott Publishing Company to meet its demands for what it deemed a fair labor agreement, and Columbia Basin Publishers, Inc. was interested in gaining all the business of Scott Publishing Company it could in order to establish its newspaper, and the two cooperated, not with the common objective of eliminating Scott Publishing Company from the field, but each with its own separate purpose." Appendix B, p. 36.)

"As for the cooperation which was established between Local 831 and Columbia Basin Publishers, Inc., Parish and Bryce, that too was a perfectly natural result of the circumstances which existed at the time. Local 831 and its members understandably were delighted to have a fair newspaper started to compete with what they considered to be the unfair newspaper. Not only did it furnish employment for Local 831 members, but it furnished also an additional lever to be used in the Union's attempt to pry an agreement from the Tri-City Herald. The publishers of Columbia Basin News likewise welcomed any assistance they could obtain from Local 831 in their attempt to build circulation and advertising and to establish a daily newspaper. There was indeed cooperation between the two, but each acting for its own legal independent purpose." Appendix B, p. 40.

ters each day and pick up the orders for the News obtained by members of Local 831 and affiliated unions. (Pl. Ex. 37; Tr. 857, 432.) Schmidt, President of Local 202 of the ITU, and Hutchinson, President of Local 831, were in constant communication with Parish to carry out the plan with respect to circulation. (Pl. Ex. 3061; Tr. 519, 650, 659.) This plan was effective. (Pl. Ex. 40.)

The members of Local 831 also conducted an ITU survey on the Herald's circulation. They determined where the Herald was delivered by following the carriers in cars, noted the addresses of the people taking the Herald, and turned the addresses over to their strike chairman. Attempts were then made to obtain cancellations of the subscriptions to the Herald. (Tr. 6237-38, 240-41.)

From time to time Marvick, Special Representative for the Executive Council of the ITU, and Parish discussed means of fighting the Herald by cutting down its circulation. (Pl. Ex. 84; Tr. 972-75, 4777-79.) The joint effort of all the respondents is well documented in Plaintiff's Exhibit 253, which contains in part a report by Sandy Bevis, Special Representative of the ITU. Bevis reported that he had had discussions with the publisher of the News, members of Local 831 and the Central Labor Council in September 1951. All concerned concluded "that the circulation weapon must be used and their efforts will now be concentrated to this end." Plaintiff's Exhibit 206-J is a special assistance report containing a description of a secret meeting on February 15, 1952, attended by Walter Dworschak, Secretary of Local 831, Parish, Marvick of the ITU and others, to work out a plan to increase circulation and advertising for the Columbia Basin News at the expense of the Herald. Plans were laid for publication of the News six days rather than five. (Tr. 988-89.) Subsequently, the News did commence

six-day publication. Such joint activity against the Herald was most effective in cutting down its circulation and in boosting the circulation of the News. (Pl. Exs. 483, 484, 252; Tr. 6604.)

(2) *Attempts to Deprive the Herald of National Advertising Revenue.*

Representatives of Local 831 and the News cooperated to divert national advertising from the Herald. A system was set up in ITU Headquarters in Kennewick whereby the advertisements in the Herald were scrutinized every day and then letters were written to such national advertisers both within and without the State of Washington, advising them of the strike against The Tri-City Herald and the publication of the "fair Columbia Basin News." (Pl. Exs. 393, 400; Tr. 6581.) Calls were made upon such advertisers and national advertising agencies in the State of Washington by Parish, Bryce and members of Local 202 of the ITU to inform them of the strike against the Herald and to urge publication in the News. Letters were also written directly to certain advertisers by members of Local 202 to the same effect. (Pl. Exs. 393, 400.)

(3) *Campaign to Divert Local Advertising from the Herald.*

Members of Local 831, in cooperation with the News, conducted a vigorous and effective campaign to divert local advertisers from the Herald. Personal calls were made upon merchants by members of Local 831. (Pl. Exs. 128, 206-I, 176, Minutes of March 4, 1950 Meeting of Local 831.) Merchants who continued to advertise in the Herald were placed on the unfair list which was published in the News without charge to the Union, and distributed by other means. (Tr. 545; Pl. Ex. 206-A to E.) Radio broadcasts were also used

to persuade merchants not to advertise in the Herald. (Pl. Exs. 6, 27, 8, 12, 206-G, 206-H, 206-I, 206-K, 206-L, 206-M, 206-N, 206-O, 84, 248, 252, 253, 256, 264, 389, 400, 483; Tr. 6578, 6581, 2889-90, 6158, 6161, 6170-71, 6242-43, 6210, 6473-74.)

(4) *Joint Operation of Columbia Basin News by Defendants.*

The newspaper respondents made detailed daily, semi-weekly and weekly reports to the Union. Such reports discussed circulation and advertising rates (*e.g.*, Pl. Exs. 25, 26, 27, 78, 79, 81, 72, 84, 86, 87, 88, 90, 101, 120, 140, 193, 195, 334 and 497). Parish and Bryce and the Columbia Basin Publishers, Inc. in turn received letters from ITU officers containing advice and directions with respect to the operation. These letters are very similar in content to letters passing between divisions of a corporation. (Tr. 1177-1201; Pl. Exs. 120-36.) Every detail of the expenditures of the Columbia Basin News was passed upon by the Union. (Tr. 1193; Pl. Ex. 132.) In carrying out this policy of joint operation, Parish and Bryce made many trips to Indianapolis and held numerous meetings with representatives of the ITU and Unitypo in the State of Washington. (Tr. 1122-30, 965; Pl. Exs. 114, 223, 83, 193, 195, 206-J, 243, 497, 71.)

Although the trial court substantially accepted the evidentiary fact urged by petitioner, the court held the combination and agreement were not unlawful because each group of respondents acted "for its own legal independent purpose." (*Supra* at page 8.)

The trial court did not discuss the alleged violation of the Robinson-Patman Act but merely recited the statutory language and concluded that there was no violation.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court Below Is in Conflict with the Decisions of This Court Which Have Held: (1) That the Creation and Maintenance of a Group Boycott as Found by the Trial Court Is a Per Se Violation of Section 1 of the Sherman Act, and (2) That Combinations and Conspiracies Are Not Exempted From the Antitrust Laws Because the Conspirators Were Motivated by Separate, Independent Purposes.

A. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH LOEWE V. LAWLOR, 208 U.S. 274 (1908); DUPLEX PRINTING PRESS CO. V. DEERING, 254 U.S. 443 (1921); BEDFORD CUT STONE CO. V. JOURNEYMEN STONE CUTTERS' ASS'N, 274 U.S. 37 (1927); AND KLOR'S INC. V. BROADWAY-HALE STORES, INC., 359 U.S. 207 (1959).

As early as 1908, the Supreme Court held that a group boycott of a commercial firm is a violation of Section 1 of the Sherman Act. *Loewe v. Lawlor*, 208 U.S. 274 (1908). See also: *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927); and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).[8] *Klor's Inc. v. Broadway-Hale Stores, Inc., supra*, unequivocally establishes that such a boycott is a per se violation of Section 1.[9]

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8. Although *Loewe v. Lawlor, supra*, *Duplex Printing Co. v. Deering, supra*, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, supra*, were decided prior to enactment of the Norris-LaGuardia Act, the immunity for a labor union provided by the Clayton and Norris-LaGuardia Acts does not apply to the Union respondents here since they have combined with a nonlabor group. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945). Furthermore, Unitypo, Inc., and Howard Parish and Associates, Inc., as corporations organized for profit and with stock issued, are not immune under the express terms of the statute. *Cf. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

9. The applicable principle of law was recently stated by Judge Wyzanski in *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *modified* 284 F.2d 582 (1st Cir. 1960), at page 140 as follows:

> "When union representatives and ULC representatives together called upon a merchant, and the union man asked the

The application of the law of such cases to the facts found by the trial court (*supra* at pages 8-12) requires a conclusion that respondents violated Section 1 of the Sherman Act for the trial court found that the newspaper and Union respondents cooperated in depriving Scott Publishing Co., Inc. of its circulation and advertising. Such cooperation included the organization and maintenance of group boycotts of The Tri-City Herald by subscribers and advertisers.

Although petitioner consistently in its complaint (R. 4, 9, 10, 24-27, and 37 and 38) at the trial (Tr. 7291-92), and in the Court of Appeals (Opening Brief for Appellant, pp. 49-54; Reply Brief for Appellant, pp. 10-15; Petition for Rehearing, pp. 2-4) urged that the alleged Sherman Act Section 1 violation stemming from the group boycott should be considered as distinct from the alleged Sherman Act Sections 1 and 2 violations based upon conspiracy or combination to monopolize, neither the trial court nor the Court of Appeals did so. Both courts discussed the Sherman Act violations only in the context of respondents' purpose and intent, or lack of purpose and intent, to monopolize. (Appendix A, p. 3, Appendix B, pp. 24 and 36.) Such intent or purpose is, of course, unnecessary for violation of Section 1 by a group boycott.

The failure of the trial court and the Court of Appeals to consider such issue resulted in the erroneous judgment

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merchant to boycott The Gazette and the ULC man asked the merchant to advertise in the ULC shopper, this was in effect a joint appeal by the union and the ULC to boycott The Gazette. Such a group boycott organized by one of two competitors in a market was a *per se* violation of Section 1 of the Sherman Act, was conclusive evidence of an intent to exclude competition unlawfully, and proved that ULC attempted to monopolize the market in violation of Section 2 of the Sherman Act. [Cases cited.] Nor was resort to such a group boycott excusable merely because among those participating were union representatives. [Cases cited.]"

which is in direct conflict with *Loewe v. Lawlor, supra, Duplex Printing Press Co. v. Deering, supra, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, supra, Klor's Inc. v. Broadway-Hale Stores, Inc., supra,* and *Allen Bradley Co. v. Local Union No. 3,* 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945).

B. THE DECISION BELOW IS IN DIRECT CONFLICT WITH ALLEN BRADLEY CO. V. LOCAL UNION NO 3, 325 U.S. 797 (1945) AND OTHER LEADING CASES OF THE SUPREME COURT.

Another argument by counsel for respondents (Tr. 7202-04), which was accepted by the trial court and the Court of Appeals, was that in injuring petitioner, the Union and newspaper respondents were motivated by different purposes and, therefore, the two groups could not combine or conspire in violation of the Sherman Act. (Appendix B, pp. 36, 40.) The Court of Appeals affirmed the trial court's statement of law which statement is in direct conflict with the cases decided by the Supreme Court of the United States. The fact that each person joining an agreement or combination has a different motive or purpose for doing so does not prevent such combination or agreement, and acts done pursuant thereto, from being in violation of the antitrust laws. *Allen Bradley Co. v. Local Union No. 3, supra,* is directly in point. In holding that a union and commercial firms had violated the antitrust laws by combining and conspiring in restraint of trade, Mr. Justice Black expressly noted that the labor unions' "spur to action related to wages and working conditions" (p. 807). Obviously the commercial firms who participated in such illegal combination were motivated by wholly different reasons. Furthermore, the trial court's holding that separate purposes prevent an antitrust violation is in direct conflict with a host of cases decided by the Supreme Court of the United States

which hold that although participants in a combination or conspiracy might lawfully carry on the proscribed activity if each acted separately and independently from the other, they may not combine and conspire in restraint of trade to carry out the very same activity. See *e.g., Swift and Company v. United States*, 196 U.S. 375, 33 S. Ct. 90, 57 L. Ed. 243 (1905).

It is apparent that such error of law was a significant contributing factor to the trial court's conclusion that there was no illegal combination or agreement.[10]

In order to demonstrate the importance of this error, it is desirable to illustrate the uncontradicted evidence concerning the intent and purpose of the two groups of respondents.

The following documentary and uncontradicted oral testimony establishes that the newspaper respondents planned from the outset to force petitioner to merge with Columbia Basin Publishers, Inc. Parish advised officers of petitioner in 1949 that if he could not acquire petitioner's business on his terms, he would come into the area and take away petitioner's advertising and revenue so that petitioner's business would be practically worthless and when he got through he would buy petitioner's business for 5c on the dollar. (Tr. 2840-41, Appendix B, p. 30.) Subsequently, Parish did commence publication of a newspaper in the Tri-City Area and, according to the uncontradicted testimony, Parish communicated to various of his key employees his intent to force The Tri-City Herald to merge with his paper. He communicated this purpose to Allen Cook, his advertising manager

10. The Supreme Court held in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505, 515 (1960), that Rule 52 of the Federal Rules of Civil Procedure has no application because " • • • the District Court premised its ultimate finding that Parke, Davis did not violate the Sherman Act on an erroneous interpretation of the standard to be applied."

(Tr. 429-30) and to William Scheyer, the general manager of the Columbia Basin News in 1950 and 1951. (Tr. 469-70, 471-75.) In a letter dated June 21, 1950, Parish referred to petitioner and stated:

> "They are over expanded and I think a merge [sic] can be made at the right time." (Pl. Ex. 41.)

During the summer of 1950 and prior to financing by the ITU, Parish also attempted to obtain additional moneys from Mrs. Johnny Johnson. He advised her that:

> "* * * the Herald could not last much longer and that if they got this assistance [money from the union] they would soon be able to have the field to themselves either by being able to merge the competitor newspaper or that they would just go out of business, to that effect, and that once he had—he was the only daily newspaper in that area, they were going to make a good profit." (Tr. 1569-70.) (See also Tr. 1574-75.)

In a letter dated April 16, 1951, Bryce wrote to Don Hurd, Secretary of the ITU, detailing the injury to The Tri-City Herald resulting from the News' operations with the ITU's funds, and said:

> "Being in touch with the situation from day to day and with a supreme desire to do the most harm to the enemy, we did not announce a circulation rate increase until today.
>
> * * * * * * *
>
> "We know the mechanical problems of our staff, but we are always telling them that *there is plenty of newspaper equipment right on the ground when we take over the field.*
>
> "The following we say with great sincerity: success can come with startling suddeness so that there are blueprints and plans that must be made at this time in order to be ready. We think this calls for a meeting

with you this month or early next. Will you kindly take this up with your board and please advise us when it would be convenient to have us meet with you." (Emphasis added.) (Pl. Ex. 497.)

In June 1951, Bryce called the attention of the ITU Executive Council to the growth in the Tri-City Area as reflected in a news item in The Wall Street Journal and then said:

"This is forwarded to you to give an idea of the fabulous value a good newspaper property can be a few years hence, *especially once the field is secured for the News alone.* For your information, the Government officials claim that within ten years Pasco will be even larger than Spokane." (Emphasis added.) (Pl. Exs. 73, 101.)

Bryce also wrote to the ITU on July 28, 1951:

"Such a move does tend to show that there are troubles on the horizon for our competitor, and sooner or later a deal, maybe a deal can be made on our terms. There is little doubt that *once a consolidation of the field is accomplished there would be a fantastically valuable field, and more than compensate for the heavy expenditures at this time.*" (Emphasis added.) (Pl. Ex. 75; Tr. 1507-08.)

Parish was still striving toward his objective of forcing petitioner to merge with his group in 1954:

"Q. (By Mr. Jonson) Now, as to Plaintiff's Exhibit 82, let me read the last paragraph on the second page, Mr. Parish: 'A week ago today I received a special delivery letter from San Francisco asking me to consider a deal to take Lee in with us and make a combination with Lee being part of the set-up. I am not interested—Lee must be licked.' * * * Now, I take it, then, Mr. Parish, as of April 12, 1954, you had put out of your mind any thought about merging with the Tri-

City Herald, and you then just wanted to drive the Tri-City Herald out of business, is that right?

"A. (Parish) Not at all. I wanted Lee to approach me.

"Q. I beg your pardon?

"A. I wanted Lee to approach me direct." (Tr. 960.)

In a letter from Parish to Martin on January 13, 1955, Parish referred to a column written by Glenn Lee (publisher of The Tri-City Herald) in which Lee had said that Parish had once tried to buy him out. Parish then commented, "I am glad he said this as no one will have pity for him when we break him." (Pl. Ex. 86.)[11]

Before turning to the Union respondents' motivation and purpose, an additional basis for the liability of the Union respondents should be noted. The Union respondents were aware of the newspaper respondents' intent and purpose to force petitioner to merge with Columbia Basin Publishers, Inc. The correspondence and testimony of meetings between the Union representatives and the newspaper representatives discussing the merger objective remained uncontroverted. Many of the letters expressing this purpose contained requests for funds from the Union. They were read, initialed and approved by the Executive Council of the ITU and the Board of Directors of Unitypo, Inc. and, thus, became official documents of the ITU and Unitypo, Inc. Having knowledge of the illegal plan of the newspaper respondents, the Union encouraged and assisted newspaper respondents by financing their activity and by cooperating

11. The foregoing declarations are but a small part of similar declarations in numerous exhibits in evidence and in testimony of key employees of the Columbia Basin News. Although Parish and Bryce testified in petitioner's case in chief as adverse party witnesses, Bryce was not cross-examined and Parish was asked only one question by his counsel—his age. (Tr. 1400.) Neither was called as a witness in respondents' case.

in other activities for the purpose of depriving Scott Publishing Co., Inc. of its advertising and circulation revenue. Irrespective of Union motives, such encouragement, acquiescence, and assistance with knowledge of the illegal purpose to force a merger is alone sufficient to hold the Union respondents as participants in a conspiracy and combination in violation of the antitrust laws. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 at 161 (1948), this Court declared "* * * acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." See also *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). Evidence of the Union respondents' motives was thus unnecessary, a fact which was not considered by either the trial court or the Court of Appeals.

Nevertheless, petitioner introduced evidence of the Union's motivation. The evidence establishes that, in certain selected areas where a strike develops, the Union in order to make an example of the struck publisher, will seek to injure him until he capitulates or is "replaced."

First, the policy of the ITU and Unitypo is admittedly based upon an intent to injure the struck publisher by depriving him of advertising and circulation revenue. To this end, they support a newspaper in rivalry with a newspaper whose employees are on strike.

Second, The Tri-City Herald was specially selected by the Executive Council of the Union to be an example of the Union's power to injure a recalcitrant publisher. (Tr. 4371-80, 4520.) Once a struck publisher is selected to be an example, the controversy is no longer confined to the local problem of maintaining a few jobs for ITU members. On the contrary, it becomes to the Union a battle watched by all publishers on the West Coast and even throughout the

United States. (Pl. Exs. 73 and 101; Tr. 4317.) The Union is willing to demonstrate their power by sacrificing a few jobs (which they might regain in the event of a merger) if such sacrifice enables them better to negotiate in a broad area such as the West Coast. (Tr. 4317.)

Third, the official Union policy contemplated the necessity of putting stubborn publishers "out of business or on the rocks." (Pl. Ex. 240.) Such a policy is reflected in the official documents of the Executive Council (Pl. Ex. 240)[12] and in Section 17 of Article XIX of the ITU By-Laws. That section, approved by the ITU Convention, specifically authorized the Executive Council to expend funds and take other steps to replace a struck newspaper. This provision provides that the Executive Council may expend money for such "defense purposes" as they deem useful in a strike situation including "establishing or encouraging the establishment of enterprises to compete with or *replace* any establishment where a strike or lockout is or has been in progress * * *" (emphasis added). When Woodruff Randolph, the former president of the ITU, was asked the meaning of the key words "or replace" he testified as follows (Tr. 4439):

> "The words 'or replace any establishment' were put in there for the specific purpose of avoiding any controversy in case we would buy out a struck paper and keep our paper going under its own name. We have political controversy of a very sharp nature in the ITU, and unless it is very definitely stated that we could buy

12. Plaintiff's Exhibit 240 is an official document of the Executive Council of the ITU, signed by Don Hurd's secretary, to a local union in Columbus, Georgia, explaining the policy of having a businessman front, as follows: "Without a front of businessmen not identified with labor, financial success for such a venture is impossible. Experience has taught us that, no matter how strongly local businessmen may feel against the publisher of the local paper, they will not join with the Union or even cooperate to put one of their fellow businessmen out of business or on the rocks."

> such a paper we would have controversy about it. This section was drafted to make it as nearly foolproof as possible and avoid any charge that we were not authorized to do the things that we wanted to do."[13]

Fourth, the newspaper respondents' objective to force the Scott Publishing Co., Inc. to merge coincided with the Union respondents' ultimate objective of complete destruction in the event the struck newspaper refused to capitulate. There is no evidence that the Union respondents at any time directed Parish to cease his plan to buy out The Tri-City Herald because it was contrary to Union policy. Indeed, in 1951 when Bryce approached The Tri-City Herald with respect to merger, it was with the encouragement of the Union and with the instruction that they were to be informed of the outcome of such talks. (Pl. Ex. 74, letters from James Bryce to Don Hurd of the ITU, dated July 28 and 30, 1951.) In other words, there is no evidence of any conflict between the objectives of the newspaper respondents to force a merger and the Union respondents' objectives of replacing the stubborn publisher.[14]

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13. Randolph subsequently confessed to the significance of this admission by attempting to alter completely his testimony. (Tr. 4552-55.) But such inconsistency merely reflects on Randolph's credibility and is of no comfort to the respondents in the light of the unequivocal language of Article XIX, Section 17, expressly establishing a policy of replacing a struck newspaper. (Tr. 1807, 4439.)

14. The Court of Appeals assumed that, " • • • if Scott had been willing to accept a Union contract such as the contract the News had with Local 831, Scott's trouble with the Union would have been over." (Appendix A, p. 14.) The trial court was also apparently persuaded by the same assumption. (Appendix B, p. 49.) However, cases decided by the Supreme Court of the United States establish that the conditional objective of one of the conspirators does not preclude violation of the antitrust laws. Therefore, even if it were true that the Union respondents intended to drive The Tri-City Herald out of business only if the Herald continued to refuse to sign a contract, the opportunity given the victim to accede

The facts, therefore, may be summarized as follows: The newspaper respondents at all times intended to force petitioner to merge with Columbia Basin Publishers, Inc. The Union respondents either intended to replace petitioner with a so-called "fair" publisher, or at least intended to take away petitioner's business, if that could be done, in order to force petitioner to capitulate to the Union's demands. With full knowledge of each other's purposes, the newspaper respondents and the Union respondents joined forces and agreed to do, and did do, everything in their power to deprive petitioner of its business. The conclusion which the trial court and the Court of Appeals apparently reached—that such activity with such knowledge was not a violation of the antitrust laws—is in direct conflict with the decisions of the Supreme Court of the United States, disregards the statutory language in the antitrust laws and the intent of Congress, and will seriously cripple the enforcement of the antitrust laws.

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to the Union's demands in no way exonerates the conspirators. Clear authority that a conditional objective by the conspirators does not prevent violation of the Sherman Act is found in the many cases holding Union members liable for boycotts (prior to the Clayton and the Norris-La Guardia Acts) although the objective was conditional. See, *e.g.*, *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927). In such cases the conspiracy to boycott would have ceased when the struck employer capitulated to the Union demand, but that fact did not absolve the Union's conduct. Additional cases contrary to the trial court's holding in this case involve restraints imposed by trade associations, such as *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, 610-11 (1914); and *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941).

II.

Although the Trial Court Erroneously Concluded That There Were No Price Differences (Price Discriminations) in the Sale of the Advertising by Respondents, the Court of Appeals Improperly Construed the Trial Court's Recitation of the Statutory Language of the Robinson-Patman Act as a Finding Adverse to the Plaintiff on the Requisite Competitive Injury.

A. RESPONDENT COLUMBIA BASIN PUBLISHERS, INC. DISCRIMINATED IN PRICE IN THE SALE OF ADVERTISING.

There were without question substantial price discriminations[15] by the Columbia Basin Publishers, Inc. extending over the five-year period from 1950 to 1955. Such discriminations were not denied in the Court of Appeals by respondents[16] and were apparently recognized by the Court of Appeals.[17]

B. THE TRIAL COURT ERRONEOUSLY FOUND NO PRICE DISCRIMINATION AND MADE NO FINDING OF FACT CONCERNING THE REQUISITE COMPETITIVE INJURY.

The trial court, in its opinion, first discussed the alleged violations of the Sherman Act. The court then turned to the charged violation of the Robinson-Patman Act and made a general conclusion of law in the words of the statute as follows:

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15. Petitioner here, as elsewhere in its petition, uses the term "price discrimination" as being synonymous with "price difference" in accordance with the mandate of the Supreme Court in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). Of course, a price discrimination constitutes but one element of a Robinson-Patman Act violation; for example, the requisite competitive injury must also be established.

16. Nor do respondents claim that the affirmative defense of cost justification or good faith meeting of competition is available to them.

17. Appendix F contains a description of the Exhibits and reference to the testimony which establishes such price discrimination in the sale of advertising by respondent Columbia Basin Publishers, Inc.

> "* * * that there were no price discriminations by Columbia Basin News in the sale of advertising which had the effect of lessening competition or tended to create a monopoly or injure, destroy or prevent competition. * * *" (Appendix B, p. 56.)

Petitioner contends that a fair reading of the opinion is that the court's recitation of the statutory language is merely an erroneous conclusion that there was no price discrimination. In short, the trial court, deluded by respondents' bland assertions that there were no price discriminations, did not discuss the question of competitive injury. Having found no price differences, the court would not be expected to and did not consider the effect of such price differences, that is, whether or not there was injury to competition. Yet the Court of Appeals treated the District Court's insertion of the statutory language as constituting a finding adverse to petitioner on competitive injury.

C. THE COURT OF APPEALS' ACCEPTANCE OF THE TRIAL COURT'S RECITATION OF THE STATUTORY LANGUAGE AS A FINDING OF FACT ON COMPETITIVE INJURY IS IMPROPER.

In construing the trial court's recitation of the statutory language as a finding, the Court of Appeals disregarded decisions of the Supreme Court and, indeed, of the Court of Appeals for the Ninth Circuit, which hold that such a general conclusion in the words of the statute is not compliance with Rule 52(a) of the Federal Rules of Civil Procedure which provides that the court shall find "the facts specially." As recently stated by the Supreme Court of the United States in *Commissioner v. Duberstein*, 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960), at p. 1229: "* * * the unelaborated finding of ultimate fact * * *" that the transfer in question was a "gift" could not be accepted as a compli-

ance with Rule 52(a). The court stated: "It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task." Certainly such holding is controlling here. For to merely recite the language of the Robinson-Patman Act is not the semblance of an indication of a legal standard which was allegedly applied. Certainly in an action which may ultimately determine the life or death of petitioner, in which thousands of man-hours were devoted in preparation for trial, and where the trial court requests and receives comprehensive proposed findings of fact from both parties, the litigants and the appellate courts are entitled, under the law, to more than recitation of the statutory language. See also: *Kelley v. Everglades Drainage District*, 319 U.S. 415 (1942); *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1952), at 1434-35.[18]

III.

The Court of Appeals' Erroneous Acceptance of the Trial Court's Recitation of the Statutory Language of the Robinson-Patman Act as a Finding of Fact on the Requisite Competitive Injury Cannot Be Justified Merely Because Petitioner Continued to Be the Larger of the Two Competitors in the Market.

A. PETITIONER MAY NOT BE PRECLUDED FROM SHOWING THE REQUISITE COMPETITIVE INJURY MERELY BECAUSE IT MANAGED TO RETAIN MORE ADVERTISING BUSINESS THAN THE COLUMBIA BASIN NEWS WAS ABLE TO ACQUIRE.

The Court of Appeals attempted to justify its acceptance of the trial court's recitation of the statutory language of the Robinson-Patman Act by pointing out that at all times

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18. The Court of Appeals for the Ninth Circuit has remanded cases in which the trial court's findings of fact were conclusory as they are in the subject action. In *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955) the court remanded the case where "the findings • • • provide no such understanding and give no hint as to the factual basis for the ultimate conclusion."

petitioner remained the dominant newspaper in the area. Even if it is assumed that The Tri-City Herald was the "dominant newspaper,"[19] the evidence and law referred to and discussed below demonstrate that such fact does not preclude the requisite competitive injury.

B. THERE WAS A SUBSTANTIAL DIVERSION OF BUSINESS FROM THE TRI-CITY HERALD TO THE COLUMBIA BASIN NEWS AS THE RESULT OF ILLEGAL PRICE DISCRIMINATION.

The evidence is uncontradicted that The Tri-City Herald had great difficulty selling both cooperative and local advertising because of the double billing and other price discrimination practices of the Columbia Basin News. (Tr. 261-62, 2961.) One qualified witness for the petitioner testified that at least 40% of the advertising of certain preferred customers in the Columbia Basin News would have been obtained by The Tri-City Herald if there had not been such price discrimination. (Tr. 3560; see also 2961, 3106-07, 3492.) The proof of damage to The Tri-City Herald resulting from such rate discrimination in favor of 21 selected advertisers of the News is marked as Plaintiff's Exhibit 320. As would be expected, a number of the advertisers freely

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19. Such assumption ignored the uncontradicted evidence that the Union had available a $12,000,000 war chest collected from its other newspapers and other sources which it was committed to use in this local market. (Tr. 479-80.) The situation is analogous to that of a large chain store coming into an area and engaging in sales below cost against a single local competitor which, until the arrival of the chain store, was dominant in the market. Such price discriminations have always been held to be a violation of the Robinson-Patman Act. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *Maryland Baking Co.*, 52 F.T.C. 1679 (1956), *aff'd*, 243 F.2d. 716 (4th Cir. 1957); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960). In such situations are the courts now to require that the dominant local concern be eliminated or reduced to a minor share in the market before it can sue although the statute was expressly designed to reach competitive injury in its incipiency?

conceded that they advertised in the News because of the rates which they were given and that their special prices were of primary consideration in their determination as to which paper would receive advertising. (Tr. 3970, 3984, 4035-36.) In addition, a number of the letters of Howard Parish and James Bryce and various managers of the News bragged of the accounts and linage that they were diverting from The Tri-City Herald as a result of their special deals. (Pl. Exs. 73, 78, 80, 82, 83, 90, 101, 111, 121, 122, 125, 127, 128, 130, 131, 174, 181, 188, 189, 193.) Scheyer, a general manager of the News, testified to certain special rates which were given in order to take certain advertisers from the Herald and which accomplished that objective. (Tr. 525-30.)[20] The evidence of diversion of the business was not discussed by the trial court or the Court of Appeals.

C. ALTHOUGH THERE IS NO INDICATION AS TO WHAT LEGAL STANDARD, IF ANY, WAS APPLIED BY THE TRIAL COURT AND THE COURT OF APPEALS WITH RESPECT TO THE REQUISITE CRITERION OF COMPETITIVE INJURY UNDER THE ROBINSON-PATMAN ACT, THE EVIDENCE AND LAW ESTABLISH A VIOLATION REGARDLESS OF WHICH LEGAL STANDARD IS APPLIED.

The decisions are not conclusive as to whether substantial diversion of business from a single competitor in a market where there are a large number of competitors is sufficient to establish competitive injury within the meaning of the Robinson-Patman Act. The Federal Trade Commission and several courts take the position that such a showing is sufficient proof. (*Samuel H. Moss, Inc.*, 36 F.T.C. 640 (1943), *aff'd*, 148 F.2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734

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20. Once the advertising of certain favored or "bell cow" advertisers was obtained by price discriminations, additional advertising was secured by pointing to the "bell cow" advertisers as proof of public acceptance. (Tr. 532-33, 1374, 3092-93.) This practice was condemned by Judge Wyzanski in *Union Leader Corp. v. Newspapers of New England, Inc.*, *supra* (180 F. Supp. at 140).

(1945), *motion to modify order denied*, 155 F.2d 1016 (2d Cir. 1946); *E. Edelmann & Co. v. FTC*, 239 F.2d 152 (7th Cir. 1957), *cert. denied*, 355 U.S. 941 (1958); *H. J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452 (S.D.N.Y. 1960); *Krengel Mfg. Co., Inc.*, 46 F.T.C. 75 (1949); and *Pure Oil Co.*, 1959-1960 Trade Reg. Rep. Pars. 27,791 and 28,370 (1959).) If this standard is adopted, then a fortiori petitioner has established that the News' price discriminations resulted in competitive injury. (*Supra* at p. 27.)[21]

Regardless, the courts do agree that the Robinson-Patman Act was designed to reach price discriminations "in their incipiency." *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945). It is not necessary to prove that the discriminations have in fact harmed competition, but only that there is a "reasonable possibility" that they "may" have such an effect. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). This is true in primary-line cases as well as in secondary-line cases. *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960). See also: *H. J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452 (S.D.N.Y. 1960). The statute literally applies when the competitive effect "*may be* substantially to lessen competition or tend to create a monopoly *in any line of commerce* or to injure, destroy, or prevent competition with any person *who either grants* or knowingly receives the benefit of such discrimination." (Emphasis

21. Respondents do not and cannot find evidence disputing the substantial diversion of business resulting from such price discrimination, and the dangerous probability that such injury would put the Herald out of the market. (*Supra* at p. 27.) Directly in point is *Maryland Baking Co.*, 52 F.T.C. 1679 at 1689 (1956), *aff'd*, 243 F.2d 716 (4th Cir. 1957), where the respondent reduced the market share of its competitor from 91.3% to 58.2% by price discriminations and the court found a violation of the Act.

added.)[22] In applying the "reasonable possibility" test the courts have properly looked to a number of factors which are pertinent here.

(1) Because of the approximately equal coverage of the two newspapers, price is the key factor in determining the purchase of advertising in this market. (Tr. 3970, 3984, 4035-36.)[23] *Krengel Mfg. Co., Inc.*, 46 F.T.C. 75 (1949).

(2) If the victim of the price discrimination is the only other competitor in the market, any substantial diversion of business and injury to the competitor is a threat to "competition" in the market. *Atlas Building Products Co. v. Diamond Block & Gravel Co., supra; Maryland Baking Co.*, 52 F.T.C. 1679 (1956), *aff'd*, 243 F.2d 716 (4th Cir. 1957); *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *H. J. Heinz Co. v. Beech-Nut Life Savers, Inc., supra*, at 464-65.

(3) Where the price discriminator has, as did the News here, a substantially greater amount of financial resources to fall back on during a price war, the possibility of competitive injury is enhanced. *Maryland Baking Co., supra; H. J. Heinz Co. v. Beech-Nut Life Savers, Inc., supra.*

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22. The Court of Appeals stated the test as follows: "The language of the Act provides that a discrimination in price is unlawful 'where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.'" (Appendix A, p. 19.) The Court of Appeals, therefore, failed to cite, and apparently did not consider, the key language of the Act declaring unlawful any price discrimination "* * * where the effect * * * may be * * * to injure, destroy, or prevent competition with any person * * *."

23. Although the circulation of the News was slightly less than the Herald, it extended its coverage by free distribution and by use of the Shopper. Moreover, the effect of price discrimination was magnified by publicity that various leading local merchants (who had been given secret price reductions) were exclusive with the News. These "bell cow" advertisers enticed both local and national advertising from the Herald. (*Supra*, p. 28.)

(4) Where the discriminator acts with predatory intent, seeking deliberate harm to his competitor, the courts are certain to find that injury to competition was reasonably possible.[24] *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Anheuser-Busch, Inc. v. FTC*, Trade Reg. Rep. Par. 69,904 (7th Cir. 1961); *Balian Ice Cream Co., Inc. v. Arden Farms Co.*, 231 F.2d 356 at 369 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).[25]

(5) Here the price discriminator made its discriminatory sales below cost, thus creating a dangerous situation for a competitor which does not have a $12 million war chest. Selling below cost awards the market to the competitor with the long purse and not necessarily to the best operator who would survive if normal economic forces governed. Such sales alone are determinative in establishing the reasonable possibility of competitive injury. *Maryland Baking Co., supra; E. B. Muller & Co. v. FTC, supra.*

(6) The secrecy of the rebates and cut rates given by the News also prevented competition by the Herald and brought injury to the competitive processes. *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 at 141-42 (D. Mass. 1959), *modified on other grounds*, 284 F.2d 582 (1st Cir. 1960).

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24. See testimony of Scheyer that the primary purpose of such price discriminations was to inflict harm on the Herald (Tr. 471) and letters and declarations of Parish and other Columbia Basin News representatives to the same effect. (Pl. Ex. 5, 73, 189; Tr. 429-30, 474-75, 1574-75.) Of course, the Union respondents concede an intent to injure the struck publisher unless he capitulates.

25. The Seventh Circuit on remand in *Anheuser-Busch* refused to enforce the FTC order because there was no evidence of any diversion of business caused by the price discriminations. The court also stressed the absence of predatory intent. Factors 2, 3, 4, 5 and 6 described above were not present in *Anheuser-Busch*. In *Balian* the decisive factor was that defendant's action was purely defensive in response to rebates by competitors, giving defendant the absolute defense of good faith meeting of competition. Factors 2, 4, 5 and 6 were not present in *Balian*.

The reasonable possibility of competitive injury is therefore clear in this two-entity market whether this Court adopts the "substantial diversion of business" criterion or whether it calculates competitive injury by undertaking an analysis of the total market impact.

CONCLUSION

The questions presented by this petition with respect to Sections 1 and 2 of the Sherman Act are of grave importance and have national impact. If the law now sanctions a combination whereby a business competitor may join with a labor union in organizing group boycotts of such competitor's rival, such law will mold not only the future national policy of the International Typographical Union and newspaper publishing companies, but also the national policy of all other unions and business concerns.

Furthermore, policies which pervade the Nation's entire economy will be shaped and altered by the trial court's and the Court of Appeals' decision that labor unions may combine with, and finance, a business concern in its effort to force such business concern's rival to merge or consolidate with it. If the ITU in such a factual setting may, as the trial court held, use one business concern as "an additional lever * * * to pry an agreement from * * * " another business concern, other unions will undoubtedly alter their policy in strike situations. Likewise, business concerns throughout the Nation must then make their policy decisions in labor-management "bargaining" with full realization that rejection of any of the terms of a union contract proposed by the union may bring about an alliance against them of their business competitor and a national union with a huge war chest.

Moreover, the holding of the Court of Appeals that the larger newspaper cannot prevail under the Robinson-Patman Act effectively robs that Act of its vitality by precluding a consideration of other economic factors which are essential to the evaluation and maintenance of a competitive market.

For the foregoing reasons, the petition for writ of certiorari ought to be granted.

Dated: October 20, 1961.

Respectfully submitted,

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(Appendices A, B, C, D, E and F Follow.)

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

No. 16,871 —June 30, 1961

Scott Publishing Co., Inc.,

Appellant.

vs.

Columbia Basin Publishers, Inc.; Howard Parish and Associates, Inc.; Howard W. Parish; James M. Bryce; Kennewick-Pasco Typographical Union No. 831; Unitypo, Inc.; International Typographical Union; Woodruff Randolph; Don Hurd; Walter D. Marvick; Charles M. Lyon; Harold H. Clark; Joe Bailey; Francis E. McGlothlin; A. L. Wilie; Seattle Typographical Union No. 202; and Allied Printing Trades Council of Seattle,

Appellees.

OPINION

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Before: HAMLEY, HAMLIN and MERRILL, Circuit Judges.

HAMLIN, Circuit Judge:

Scott Publishing Co., Inc., appellant herein, in 1955 filed an action in the United States District Court for the Western District of Washington, Northern Division, against Columbia Basin Publishers, Inc., and others,[1] appellees

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1. Howard Parish and Associates, Inc.; Howard W. Parish; James M. Bryce; Kennewick-Pasco Typographical Union No. 831; Unitypo, Inc.; International Typographical Union; Woodruff Randolph; Don Hurd; Walter D. Marvick; Charles M. Lyon; Harold H. Clark; Joe Bailey; Francis E. McGlothlin; A. L. Wilie; Seattle Typographical Union No. 202; and Allied Printing Trades Council of Seattle.

herein, seeking damages under the provisions of 15 U.S.C.A. §§ 15 and 26,[2] by reason of certain alleged violations of the antitrust laws by appellees. After extensive pretrial procedures and the signing of a pretrial order, the action was tried before the court sitting without a jury. The trial judge rendered a judgment in favor of the appellees (defendants below), and appellant filed a timely appeal to this court from that judgment. Jurisdiction was in the district court by reason of 15 U.S.C.A. §§ 15 and 26, and jurisdiction is in this court under 28 U.S.C.A. §§ 1291 and 1294.

The opinion of the district court is reported as *Scott Publishing Co. v. Columbia Basin Publishers, et al.*, 180 F. Supp. 754 (W.D. Wash. 1959), and appellant, in the statement of the case contained in its brief, has set out portions of that opinion which it admits accurately portray the background of the controversy. The facts as set out below are taken in part from those portions of the opinion of the district court adopted by appellant as uncontroverted and also from other portions of the opinion of the district court as well as from the record.

Appellant corporation was organized in the State of Washington in September, 1947, and since November, 1947, has been engaged in the business of publishing the Tri-City

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2. 15 U.S.C.A. § 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C.A. § 26. "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws • • • when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings • • •."

Herald, a daily evening newspaper, at Kennewick, Washington, and distributing such newspaper through the tri-city area of the State of Washington.[3]

In the action brought by appellant Columbia and its co-defendants were charged with combining and conspiring together for the purpose of destroying and driving out of business the Tri-City Herald in order to create a monopoly for the Columbia Basin News in the daily newspaper business in that area in violation of the antitrust laws, specifically 15 U.S.C.A. §§ 1, 2, 13(a), and 14.[4]

3. The tri-city area consists of the cities of Kennewick and Richland in Benton County, Washington, the city of Pasco in Franklin County, Washington, and the area surrounding these three cities.

4. 15 U.S.C.A. § 1, Sherman Act § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •."

15 U.S.C.A. § 2, Sherman Act § 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor • • •."

15 U.S.C.A. § 13(a), Robinson-Patman Act § 2(a). "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowlingly receives the benefit of such discrimination, or with customers of either of them • • •."

15 U.S.C.A. § 14, Clayton Act § 3. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columia or any

The principal officers of appellant since its organization have been Glenn C. Lee, publisher of the Tri-City Herald, and Robert F. Philip, president of the corporation. Lee and Philip had no newspaper experience before 1947. In that year they learned that the Pasco Herald, a weekly newspaper with a job printing shop and office supply business, located in Pasco, Washington, within the tri-city area, was for sale. They associated themselves with one Hugh Scott, who had had some newspaper experience, formed Scott Publishing Company and purchased the Pasco Herald, agreeing to pay therefor a total of $80,000 plus inventory. Scott Publishing Company took possession of the property on October 1, 1947, and continued to publish the Pasco Herald as a weekly newspaper until November 13, 1947, when it began publication of a daily newspaper. At the beginning the Herald was published five days a week; but in January, 1949, a Sunday edition was added, and since that time the Herald has been published six days a week, Saturday being excluded.[5] While the Herald was a success almost from the beginning, appellant was not without problems. Additional trained personnel, additional newsprint, an expanded plant and larger press, a carrier organization, and additional working capital were needed. As time went on, some of these problems were solved, although by the spring of 1949 there was still need of additional working capital.

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insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

5. The name of the paper was changed from the "Pasco Herald" to the "Tri-City Herald" when daily publication commenced.

Some time prior to the spring of 1949, Howard Parish, one of the appellees, became acquainted with the tri-city area. He had spent most of his life in the newspaper business and had until 1946 been the publisher of a Seattle newspaper. Thereafter he had been an officer and stockholder of The Craftsman Press, a commercial printing company in Seattle. In his activities with the Craftsman Press, Parish had met Scott and Lee and had become familiar with the financial problems they were encountering in the operation of the Herald. He became interested in getting into the newspaper business in the tri-city area; and, after getting some financial backing in Seattle, he contacted Philip in May of 1949 to ask if the Tri-City Herald was for sale. A meeting was arranged between Lee, Philip and Parish at which Parish stated that he was only interested in purchasing a controlling interest in the paper or the entire property. Lee and Philip put a price of $410,000 on the entire company, but Parish was only willing to pay $250,000. Consequently no agreement was reached. In August of 1949 Parish, his son-in-law James M. Bryce, and some Seattle businessmen incorporated Columbia Basin Publishers, Inc., hereinafter called Columbia. This corporation commenced the publication of the Pasco News, a weekly newspaper, at Pasco. The publication was continued on a weekly basis until November, 1949, when the publication was changed to bi-weekly, and at that time the acquisition of the facilities necessary to publish a daily newspaper was commenced.

During the summer and fall of 1949 there was increased labor activity in the tri-city area. The typographical workers in that area had previously been under the jurisdiction of the typographical union at Walla Walla, Washington, some fifty miles away, but in August of 1949 the defendant

Kennewick-Pasco Local 831 was chartered and affiliated with the International Typographical Union.[6] Scott at that time had no contract with the union. In December, 1949, Local 831 mailed notices to employers in the tri-city area asking the commencement of collective bargaining negotiations. These notices were sent to Scott, Columbia, Husk Printing Co., and Meverden Printing Co., the latter two being commercial job printing shops. Lee, on behalf of Scott, declined to join with the other employers in the area in meeting with the negotiating committee of Local 831. This was by reason of his personal animosity toward Parish who was attending the meetings. After several meetings between the committee of Local 831 and the representatives of three employers who did participate, a contract was agreed upon fixing a scale for members of the I.T.U. at $90 a week for 38¾ hours work. After this agreement had been reached Local 831 commenced separate negotiations with Scott. When no progress was made, Local 831 requested assistance from the I.T.U., and some special representatives of its president were sent into the area to participate in the negotiations.

Scott appealed to Pacific Northwest Newspaper Publishers Association for assistance in the negotiations, and the secretary of that association, one D. S. Haines, joined in the negotiations on behalf of Scott. These negotiations continued without agreement until March 3, 1950, when either a strike or a lockout ensued.[7] In anticipation of the

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6. The defendant International Typographical Union is a labor organization with its principal office at Indianapolis, Indiana. It has approximately 110,000 members in some 800 locals throughout the United States and Canada.

7. Whether the rupture in relations between Scott and its employees was a strike or a lockout is not clear. However, which it was is immaterial to this case.

fact that an agreement might not be reached. Scott had arranged to recruit non-union employees to produce the Herald under strike conditions. Teletypesetter equipment had been arranged for by the Publishers' Association, and this permitted the production of the paper with fewer skilled employees. When the strike or lockout occurred, publication of the Herald continued under non-union conditions.

In the period preceding the strike or lockout it was common knowledge in the tri-city area that a strike or lockout at the Herald plant would occur. Parish, Bryce and others in Columbia were aware of the possibility of labor trouble at the Herald. On March 14, 1950, eleven days after the strike or lockout at the Herald, Columbia, continuing with the plan that had been commenced earlier by the acquisition of sufficient plant facilities and personnel in November, 1949, commenced publication of the Columbia Basin News as a morning daily newspaper five days a week (later changed to six days a week).

No labor agreement has ever been reached between the Herald and the union. During this long period of time the difficulties between the Herald and the union have continued. As a part of the strike activities of Local 831 picket lines were established on the Herald premises, attempts were made to induce both readers and advertisers of the Herald to cease doing business with that paper. Merchants that advertised in the Herald were placed on "Do Not Patronize" lists which were distributed. Radio broadcasts were made, and other unions in the area were induced to discourage their members from patronizing the Herald. As the district court said: "in short all the traditional means of exerting pressure against an employer involved

in a labor dispute with organized labor was engaged in."[8] During this same period of time competition between the Herald and the News for circulation, advertising, and general business had become increasingly keen.

In the publication of the News as a bi-weekly newspaper in competition with the established daily Herald, Columbia lost money, and when it changed to a daily publication Columbia was competing not only with the Herald but with the metropolitan morning newspapers circulated in the area. Columbia continued to lose money, and when one of the principal backers died in July, 1950, Parish attempted to get financial backing from another source. This source was Unitypo, Inc.

The evidence shows that Unitypo was formed as a corporation in 1946 by the International Typographical Union. The stock of Unitypo was held by members of the executive council of the I.T.U. in trust for the membership, and funds for the operation of Unitypo were supplied by the I.T.U. from its defense fund. The evidence showed that since its inception Unitypo has started newspapers in various cities in the United States and Canada where members of the I.T.U. have become engaged in a strike or a lockout with a monopoly publisher. It has also rendered encouragement and financial assistance to publishers considered friendly to labor and who were in competition with a newspaper considered unfair by the I.T.U. The activities of Unitypo in various places in assisting newspapers who were competing with so-called unfair newspapers were described in a report of one of its committees as the "development of a new and practical economic defensive weapon for economic pressure on unfair employers through permanent and effective competition."

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8. 180 F.Supp. at 760.

Parish had heard of the activities of the I.T.U. and Unitypo, and when the losses of Columbia continued, he sought authority from the stockholders to seek a loan from Unitypo. This authorization was obtained on June 15, 1950, but it was not until after the death of one of the principal backers of Columbia in July, 1950, that Parish contacted Unitypo in Indianapolis, asking for financial assistance. A representative of Unitypo and of the I.T.U. was sent to Pasco to investigate. This representative, one Clarence R. Martin, who was an attorney for the I.T.U. and Unitypo, arranged for a $10,000 loan, which money was advanced to Columbia.[9]

The losses of Columbia continued and further loans were made or arranged by Unitypo from time to time. In one transaction the stock of Columbia was pledged to Unitypo as security. In 1954 Unitypo made a demand for payment. Subsequent to this demand the stock of Columbia which had been pledged as security was issued to Unitypo and Unitypo almost immediately transferred the stock to Parish and Bryce, who then redeposited the stock with Unitypo, endorsed in blank as security for the then outstanding loan. Also in 1952 Unitypo organized Howard Parish & Associates, Inc., a Washington corporation, and provided financing for this corporation sufficient to enable it to purchase and remodel a building which was leased and used as a plant and office by Columbia. The stock of Howard Parish & Associates, Inc., except for qualifying shares, was held by

9. The loan was arranged in the following manner: The Seattle First National Bank agreed to lend $10,000 upon receipt of a note and chattel mortgage on Columbia's plant. This was immediately endorsed by the bank and assigned to Unitypo, which reimbursed the bank. The assignment to Unitypo was not recorded. The testimony showed that the reason for making the loan in this way was the prior experience of the I.T.U. and Unitypo of having the newspaper they sought to aid encounter advertisers' resistance when it became known that the paper was receiving union support.

Unitypo. By December 31, 1958, the indebtedness of Columbia to Unitypo had reached $1,178,000. Up to this time the management of Columbia had been conducted by Parish. However, after December 31, 1958, Parish was replaced as manager of Columbia by one Edward Byrne, a former publisher of I.T.U. and Unitypo papers in Colorado and New York.

Appellant contends that there has been a violation by the appellees of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, Section 2(a) of the Robinson-Patman Act, 15 U.S.C.A. § 13(a), and Section 3 of the Clayton Act, 15 U.S.C.A. § 14.[10] The record consists of over 7,000 pages and there are over 900 exhibits. The district judge in his findings of fact and legal conclusions therefrom found against appellant on all four issues. Rule 52(a) of the Federal Rules of Civil Procedure provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." As the Supreme Court stated in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

It is with this principle in mind that we have examined the record.

Section 1 of the Sherman Act proscribes any "contract, combination . . . or conspiracy, in restraint of trade," and Section 2 makes criminal the action of any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

10. See footnote 4.

any . . . trade or commerce . . ." There was in this as in most cases no direct evidence of any contract, combination or conspiracy in restraint of trade or of any attempt to monopolize any trade; and reliance was necessarily placed on circumstantial evidence to establish appellant's claims.

The district judge, while conceding that conflicting inferences could be drawn from some of the testimony, found that no violation of Section 1 or Section 2 had been proven. He found that "the intent and purpose of Unitypo, Inc., and I.T.U., in first assisting financially the Columbia Basin News and later taking over its publication, was simply to keep in operation in the Tri-City area a newspaper to compete with the Tri-City Herald, and was not to drive the Tri-City Herald out of business for the purpose of establishing a monopoly."[11] He further found "that the purpose and intent of Parish, Bryce and Columbia Basin Publishers, Inc., at all times was to establish a newspaper in competition with the Tri-City Herald, and that accepting whatever financial assistance Unitypo, Inc., or I.T.U. were willing to furnish is not inconsistent with that intent and purpose."[12]

There was ample testimony to support the findings of the district judge. Much of it is referred to in the court's opinion. There was testimony that on several occasions subsequent to 1950 and up to 1954 the union by letter communicated with Scott in an attempt to resume negotiations for a labor contract; and that if Scott had been willing to accept a union contract such as the News had with Local 831, Scott's troubles with the union would have been over. While Unitypo, Inc., over a period of years, advanced large sums of money to continue the publication of the Columbia Basin News, yet at no time was any offer made by Unitypo to

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11. 180 F.Supp. at 767.

12. **Ibid.**

furnish Parish or Bryce or the Columbia Basin News with funds to purchase the Herald, nor was there any evidence that at any time such a request had been made by either Parish, Bryce or Columbia Basin Publishers. If there had been any intent to monopolize, the Herald probably could have been purchased for a much lesser sum of money than was advanced over the years by Unitypo. Unitypo and the I.T.U., of course, wanted to do whatever they could in order to induce the Herald to operate under union conditions. To have two newspapers in the area operating under union conditions would of course provide more work for the members of the union. Both the union and the News management were happy to receive aid from the other in the struggle each was having against the Herald. For either side to have refused aid from the other side under the circumstances would have been highly unusual. The acceptance of such aid under the circumstances is not unlawful as long as there is no contract, combination or conspiracy to restrain trade and as long as there is no monopolizing or attempting to monopolize, or a conspiracy to monopolize.

There was no evidence that the demands made by the union when they negotiated with the Herald were unreasonable, nor was there any unreasonableness on the part of the union in insisting upon a written contract with the Herald. The court found that both Scott and the union negotiated in good faith but were unable to reach an agreement. The policy of Unitypo in continuing to advance money for the publication of the Columbia Basin News was in line with its national policy which it had followed in other places when there was a labor dispute with a publisher in competition with another newspaper which operated under union conditions. The difficulty that the News had in endeavoring to be a successful paper in the

area, and the losses that it suffered in its efforts to succeed, are an indication of how firmly entrenched the Herald was.

Appellant relies upon remarks made by Parish before he established the News to the effect that he would buy the Herald out for five cents on the dollar and also on remarks later made by Parish, in letters written to Unitypo asking for more money to keep the News going, to the effect that they were "driving Lee and Scott Publishing Company to the wall" as showing an intent to drive the Herald out of business in order to create a monopoly. However, the court considered the circumstances under which those letters were written and held that they appeared to be "merely communications on the part of Parish and Bryce in the nature of a sales pitch to their financial angel in an effort to keep the money coming, and were no doubt received in that spirit by the I.T.U. and the Unitypo, Inc."[13] Referring to the statement made by Parish prior to the time that he bought the News about Philip and Lee "having to sell their newspaper to Parish at 5c on the dollar," the court felt that Parish actually believed that by reason of his superior experience in the newspaper field and his financial backing his paper would become the dominant paper in the tri-city area.

As further evidence of lack of proof of a conspiracy or an attempt to monopolize, it can be pointed out that within three months of the time of the strike at the Herald, Parish inserted an advertisement in a trade journal in an attempt to sell the Columbia Basin News. Later in that same year, there were efforts on the part of Parish and Bryce to interest Lee in the purchase of the Columbia Basin News. Lee had an appraisal made of the News plant, and thereafter there were further negotiations between Bryce and

13. **Id.** at 766.

Lee for the sale of the News to Scott. These negotiations, however, resulted in no agreement for the asserted reason that Bryce insisted that as a condition of the sale the contract between the union and the Columbia Basin Publishers, Inc., would be honored.

The appellant also complains of the fact that on occasions the News sold advertising space for less than the price listed on its "rate cards"; that it published a free distribution weekly known as the Columbia Basin News Shopper; that it gave the largest advertiser in the area, C. C. Anderson Company, free advertising in the Shopper; and that it reduced the rates to local advertisers on national advertising.[14] Appellant's theory is that appellees used unfair competitive methods in order to gain a monopoly position in the tri-city area. We feel that the evidence does not support this contention.

The district court found that while the advertising rates originally set by the News were not always followed, these rates were "totally unrealistic" when the comparative circulation of the News and the Herald was considered, and that the rates charged were not "unreasonably low" compared to the advertising rates of the Herald with its larger

14. In cooperative advertising, a national advertiser, either a manufacturer or distributor of a given product, will cooperate with a local retailer in local advertising. An advertisement will be inserted in a local newspaper advertising the product and the manufacturer or distributor will reimburse the local retailer who inserts the ad for a portion of the cost of the ad. In cooperative advertising Columbia Basin News would issue double bills, one bill to the local retail merchant at his contract rate, based on the number of inches of advertising that he used in the News, and this was the bill which the local advertiser would actually pay. Columbia Basin News issued a second bill to the local merchant to be submitted to the national advertiser for reimbursement at the open rate which in most instances would be higher than the local merchant's contract rate. In this way the local merchant would receive reimbursement for a higher proportion of the bill for the given ad than the national advertiser had agreed to pay.

circulation.[15] In March, 1951, the News revised its rate tags and thereafter "rates charged advertisers did not substantially deviate"[16] from the published rates. The evidence would indicate that the News had originally set the price that it would charge advertisers unrealistically high, and that there was a period of deviation from the published rates while management determined what price could be charged. In this connection it is well to remember that Parish and his associates probably grossly underestimated the strength of the Herald when they decided to move into the tri-city area, and it is easy to understand an initial period of instability while the paper attempted to adjust its policies to the realities of the situation.[17]

The court found that the publication of a free distribution paper, such as the Shopper, in an attempt to get complete area coverage is not an uncommon practice in the newspaper business. Concerning the free advertising given Anderson, the record shows that Anderson, the News' biggest advertiser, had advertised mostly on Fridays, result-

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15. The circulation of the Herald at all times exceeded that of the News.

16. 180 F.Supp. at 767.

17. We do not feel that **Union Leader Corp. v. Newspapers of New England,** 180 F.Supp. 125 (D.Mass. 1960), **modified,** 284 F.2d 582 (1st Cir. 1960), is applicable to the situation now before this court. In **Union Leader** the court was faced with an area that was capable of supporting only one daily newspaper; the evidence before us establishes that the tri-city area is capable of supporting two newspapers. The consistent unjustified deviation from published rates that was present in **Union Leader** is not present in this case. We feel that the factual situation in **Union Leader** so differs from the factual situation presented by this case that no benefit can be gained by torturing either until it fits the bed of the other. We are here dealing with inferences that could have been drawn from the facts that were presented to the trial judge, and the fact that Judge Wyzanski drew one set of inferences in the case before him does not mean that the evidence in this case does not support the inferences drawn by Judge Murray.

ing in an unbalanced paper. In consideration of Anderson's advertising in the News for a five-day period, Anderson was given free advertising in the Shopper. We see nothing wrong with this practice as it existed in this case. In any case the Herald was not harmed, for the evidence establishes that because of unfriendly feelings between the Anderson Company manager and Glenn Lee, publisher of the Herald, Anderson would not have placed any advertising in the Herald and would have advertised in any event in the News exclusively. It would appear from the record that the fact that the Herald did not get any advertising was due solely to the animosity between the two men and not to the business practices of the News.

In considering the action of the News during the period in question, the court found that "[a]lmost all of the devices, including the cooperative advertising practice, the publication of the Columbia Basin News Shopper, the giving of more favorable rates to larger advertisers, and the free distribution of newspapers, used by Columbia Basin News in this competitive struggle and of which plaintiff complains, were at one time or another throughout the period here in question used by the Tri-City Herald in this competitive struggle. In addition, Tri-City Herald used devices such as rebates to advertisers and payments of commissions to local advertising agencies on local display advertising to attract advertising, which were not used by Columbia Basin News."[18] The court considered the effect on the Herald of its long struggle with the union and with the News. At first the Herald lost both advertising and circulation revenue. When the strike started, the Herald's cost increased by virtue of the high wages and overtime paid to the imported non-union labor. However, as time went on and

18. 180 F.Supp. at 768.

employees were trained, the costs were reduced and eventually became less than what they had been before the strike commenced. By September, 1950, wage cuts had been eliminated. During the following year raises were granted officers of the Herald and its financial condition has continued to improve.[19] The court found that "the Tri-City Herald at all times material has been and continues to be the dominant newspaper in the Tri-City area."[20] The appellant in its brief states "[T]he record in this case is uncontradicted that the tri-city area is capable of sustaining two newspapers."

Appellant contends that the evidence demanded a finding of conspiracy to drive the Herald out of business and of an attempt on the part of the News to create a monopoly. It wishes us to draw inferences from the testimony contrary to those drawn by the trial judge. The district judge had the opportunity to see and to hear all the many witnesses and to evaluate their testimony. After the lengthy trial the district judge in his opinion stated as follows:

> "[T]he Court finds that the intent and purpose of Unitypo, Inc., and I.T.C., in first assisting financially the Columbia Basin News and later taking over its publication, was simply to keep in operation in the Tri-City area a newspaper to compete with the Tri-City Herald, and was not to drive the Tri-City Herald out of business for the purpose of establishing a monopoly. The Court further finds that the purpose and intent of Parish, Bryce and Columbia Basin Publishers, Inc., at all times was to establish a newspaper in competition with the Tri-City Herald, and that accept-

19. Dividends on the stock of Scott were paid in 1953, 1954, 1956, 1957 and 1958. Salaries of officers were raised over the years and bonuses to officers were paid occasionally.

20. 180 F.Supp. at 769.

ing whatever financial assistance Unitypo, Inc., or I.T.U. were willing to furnish is not inconsistent with that intent and purpose.[21]

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"In this case the evidence does not show either an actual restraint of trade or a monopoly, or the specific intent on the part of any of the defendants, either individually or in combination, to restrain trade or create a monopoly in the daily newspaper business in the Tri-City area."[22]

While it may be contended that if the district court had made other and different findings in reference to a conspiracy we might have been forced to uphold them, he, however, had the primary duty to draw the inferences and to make the findings; and we cannot say after a review of the extensive record that the findings of the district judge as to absence of violations of Section 1 and 2 of the Sherman Act were clearly erroneous.

We now give our attention to the claimed violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C.A. § 13(a). The district court found that there were no price discriminations by Columbia Basin News in the sale of advertising which had the effect of lessing [sic] competition or which tended to create a monopoly or to injure, destroy or prevent competition. The appellant contends that the record shows that there were some price differences between rates charged by Columbia Basin News to one advertiser from those charged to other advertisers. This, however, in itself is not sufficient to show a violation of the Robinson-Patman Act.

In *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 367 (9th Cir. 1955), this court said:

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21. **Id.** at 767.

22. **Id.** at 770.

> "It is also broadly stated in the argument that a differential in price in and of itself constitutes discrimination within the meaning of § 2(a) of the Clayton Act, as amended.
>
> "But this postulate is universal, arrived at with insufficient bases. 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' There is no presumption set up anywhere that merely because there is a differential in various areas, necessarily a price discrimination exists." [Footnote omitted]

In *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960), the Supreme Court said:

> "What we have said makes it quite evident, we believe, that our decision does not raise the specter of a flat prohibition of price differentials, inasmuch as price differences constitute but one element of a § 2(a) violation."

The language of the Act provides that a discrimination in price is unlawful "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." The district court found against appellant and there is substantial evidence to justify the finding. As indicated above the evidence shows and the court found that the Herald has been at all times the dominant newspaper in the area. The News was a newcomer battling against the thoroughly established Herald. The Herald has significantly more linage than the News. The Herald circulation always exceeded the News. The circulation of the Herald did drop approximately 10% after the strike of March, 1950, but this is explained by reason of the labor difficulties of the Herald and by reason of the fact that there was a new daily newspaper in the area. Some loss of circulation continued during the remainder of 1950 and 1951, but by February of 1952 the circulation exceeded that of April, 1950 (the month following

the strike), and it continued to grow thereafter until in June of 1959 the daily circulation was 15,413, and the Sunday circulation was over 16,000. An examination of the advertising in the Herald discloses a steady increase in linage. In an advertisement put out by the Herald in 1957, the statement was made that "THE TRI-CITY HERALD's Consistent Advertising Lead Continues to Widen the Gap In 1957." The chart advertised at that time showed that from 1951 to 1957 there had been a very substantial increase in the amount of advertising carried by the Herald and that from 1955 on to 1957 the advertising in the Columbia Basin News had gone steadily downward. In the same advertisement the statement was made that "The TRI-CITY HERALD Leads in Total Advertising Lineage on better than a 2 to 1 margin over the second paper."[23] A comparison of the total advertising linage of the Herald and the News

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23. Another advertisement attached to the above mentioned statement reads as follows:

"The FACTS!
LOOK AT THE HERALD'S ADVERTISING LEAD!
In the important TRI-CITY MARKET
the HERALD PUBLISHES
69% of all AUTOMOTIVE DISPLAY
65% of all DRAPERIES and FLOOR COVERINGS
63% of all DRUG STORE DISPLAY
75% of all FURNITURE DISPLAY
69% of all HARDWARE and APPLIANCES
64% of all GROCERY DISPLAY
65% of all JEWELRY DISPLAY
73% of all LUMBER YARD DISPLAY
79% of all MEN'S WEAR DISPLAY
71% of all SHOE STORE DISPLAY
63% of all WOMEN'S WEAR DISPLAY
64% of all CLASSIFIED AUTOMOTIVE
64% of all REAL ESTATE — CLASSIFIED
64% of all LOCAL DISPLAY
70% of all NATIONAL DISPLAY
63% of all TOTAL ADVERTISING
82.4% COVERAGE OF ALL OCCUPIED DWELLINGS"

from 1951 through the first six months of 1959 shows the following figures:

Tri-City Herald			Columbia Basin News	
1951	378,848		1951	185,681
1952	418,172		1952	226,376
1953	494,907		1953	305,812
1954	535,998		1954	338,877
1955	600,190		1955	343,317
1956	514,869		1956	317,772
1957	538,297		1957	310,418
1958	527,712		1958	281,467
1959	253,459	(First six months)	1959	128,799

From all the evidence it appears that the Herald grew demonstrably during the years in question. The language of the Court in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 621 (1953), is appropriate to the situation presented here:

> "The Item, the alleged victim of the Times-Picayune Company's challenged trade practices, appeared, in short, to be doing well.
>
> "The record in this case thus does not disclose evidence from which demonstrably deleterious effects on competition may be inferred."

Without discussing the details of the claimed price difference relied upon by appellant, we find that there was substantial evidence in the record to justify the finding of the district court that there were no price discriminations by Columbia Basin News in the sale of advertising which had the effect of lessening competition or which tended to create a monopoly or injure, destroy or prevent competition.[24]

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24. The claim is also made by appellee that advertising is not a commodity and does not come within the provisions of the Robinson-Patman Act. The district court did not reach this issue, and in view of our finding that the evidence supports the judgment of the district court, we do not feel it necessary to reach this issue either.

The complaint also charged a violation of Section 3 of the Clayton Act, 15 U.S.C.A. § 14. The district court found that "[n]o advertising was sold in the Columbia Basin News or the Columbia Basin News Shopper, and no rates for advertising in either or both were fixed, upon any understanding or agreement that the advertiser would not advertise in the Tri-City Herald or any other advertising media in the area."[25] Appellants have not argued this violation in their brief, nor have they pointed to any evidence claimed to support the charge in the complaint. We shall therefore not discuss it.

We believe there was ample evidence in the record to support the district court's findings that there were no violations on the part of appellees of either Sections 1 and 2 of the Sherman Act, Section 2(a) of the Robinson-Patman Act, or Section 3 of the Clayton Act.

The judgment is affirmed.

(Endorsed) Opinion Filed June 30, 1961.

Frank H. Schmid, Clerk.

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25. 180 F.Supp. at 769.

APPENDIX B

In the District Court of the United States for the Western District of Washington, Northern Division

No. 4030

Scott Publishing Co., Inc.,

Plaintiff,

vs.

Columbia Basin Publishers, Inc.; Howard Parish and Associates, Inc.; Howard W. Parish; James M. Bryce; Kennewick-Pasco Typographical Union No. 831; Unitypo, Inc.; International Typographical Union; Woodruff Randolph; Don Hurd; Walter D. Marvick; Charles M. Lyon; Harold H. Clark; Joe Bailey; Francis E. McGlothlin; A. L. Wilie; Seattle Typographical Union No. 202; and Allied Printing Trades Council of Seattle,

Defendants.

OPINION

This cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting by designation in the Western District of Washington, Northern Division, without a jury, commencing on the 8th day of September, 1959. Appearances: Mr. Carl A. Jonson, of Messrs. Johnson, Jonson & Inslee, Attorneys at Law, Seattle, Washington, and Mr. Howard M. Downs and Mr. Robert D. Raven, of Messrs. Morrison, Foerster, Holloway, Shuman & Clark, Attorneys at Law, San Francisco, California, appeared for the plaintiff; Mr. Joseph A. Barto of Messrs. Lundin, Barto and Goucher, Attorneys at Law, Seattle, Washington, appeared for the defendants, Columbia Basin Publishers, Inc., Howard Parish and Associates, Inc., Howard W. Parish and

James M. Bryce; Mr. Alfred J. Schweppe, Mr. Marion A. Marquis and Mr. Fredric C. Tausend, of Messrs. McMicken, Rupp & Schweppe, Attorneys at Law, Seattle, Washington, appeared for the remaining defendants, and Mr. Sidney Dickstein, of Messrs. Dickstein, Shapiro & Galligan, Attorneys at Law, New York City, New York, also appeared for the defendants International Typographical Union and Unitypo, Inc.

The action was commenced in 1955. Defendants, in addition to those presently remaining in the case, were brought in and subsequently dismissed. Extensive pretrial discovery procedures were undertaken by both sides. The trial commenced before the Court, sitting without a jury, on September 8, 1959, and consumed two months. A record of over 7,300 typewritten pages was compiled and over 500 exhibits were marked in evidence. During the trial much of the evidence was received over objection on reserved rulings, and several questions of law were presented. However, in considering the case after all the evidence was in and after able arguments by counsel for all parties, the Court has concluded that the case involves essentially a determination of the factual issues presented, and when that determination has been made, as it has, the law questions pass out of the case. In making the determination the Court has considered all of the evidence, including that which was received on reserved rulings.

Plaintiff brought this action under Sections 15 and 26, Title 15, U.S.C.A., charging defendants with combining and conspiring together for the purpose of destroying and driving out of business the Tri-City Herald, a daily newspaper published by plaintiff in the Tri-City area of the State of Washington, in order to create a monopoly for the Columbia Basin News in the daily newspaper business in that area, in

violation of the antitrust laws, and specifically Sections 1, 2, 13, 14 of Title 15, U.S.C.

Scott Publishing Company, the plaintiff herein, is a corporation organized under the laws of the State of Washington, on September 17, 1947, and since November, 1947, has been and still is engaged in the business of publishing The Tri-City Herald, a daily evening newspaper at Kennewick, Washington, and distributing such newspaper throughout the Tri-City area, as that area will be hereinafter more specifically referred to and described.

In the publication of The Tri-City Herald, Scott Publishing Company is engaged in interstate commerce. Newsprint is purchased from sources outside the State of Washington, national and international news is gathered and disseminated; national as well as local advertising is sold and published, and the Herald is distributed by mail and other means outside of the State of Washington.

The principal founders, officers and stockholders of Scott Publishing Company are Robert F. Philip, who has been president of the corporation since its formation, and Glenn C. Lee, who has been Secretary-Treasurer since the inception of the corporation. Glenn C. Lee has been publisher of the Tri-City Herald and Philip has assisted in its management. Lee and Philip, though experienced businessmen in other fields, had no experience in the newspaper publishing business prior to their entering that field in the Tri-City area.

The Tri-City area consists of the cities of Kennewick and Richland in Benton County, Washington, and the City of Pasco in Franklin County, Washington, and the area surrounding those three cities. Formerly Pasco and Kennewick were small farming communities on the Columbia River, and Richland was non-existent, but with the end of

World War II and the advent of atomic energy, the Hanford Atomic Works was constructed and Richland was established on government land with government owned houses and buildings to house the workers at the Atomic Energy plant. In the fall of 1947, McNary Dam was constructed on the Columbia River at a point some 14 miles from Kennewick and additional dams were planned for the development of the Columbia Basin. Public power was available in the area and irrigation projects were established, all of which led to a substantial growth of the area in population and economic activity. By 1947, there was a population of around 50,000 in the Tri-City area, and its future economic potential seemed very great.

In 1947, Lee and Philip, who were then in the import-export business, became aware of the Tri-City area and its potential for future development and learned that the Pasco Herald, a weekly newspaper, job printing shop and office supply business in Pasco, Washington, was for sale. At about the same time Lee and Philip became acquainted with one Hugh Scott, a man who had had some newspaper experience, and the three decided to form Scott Publishing Company, the plaintiff herein, and purchase the Pasco Herald, which they did, agreeing to pay the former owner a total of $80,000, plus the inventory. Scott Publishing Company took possession of the property on October 1, 1947. Scott ceased to be an officer and director of Scott Publishing Company in 1949.

Scott Publishing Company operated the job shop and office supply business and continued to publish the Pasco Herald as a weekly paper until November 13, 1947. The operation was a profitable one. The potential growth factors of the Tri-City area were such that Scott, Lee and Philip decided that a daily newspaper would be successful

in the area, and within a matter of weeks after Scott Publishing Company took possession of the Pasco Herald, publication of a daily newspaper was planned, and on November 13, 1947, the first issue of a daily paper was published. Initially the paper was published 5 days a week, but in January, 1949, a Sunday issue was added, and ever since, the paper has been published six days a week, excluding Saturday. The name of the paper was changed from the Pasco Herald to the Tri-City Herald when daily publication commenced.

The conversion of the weekly Pasco Herald to the daily Tri-City Herald was almost an immediate success, but it raised serious problems for Scott Publishing Company. The expanded operation required more personnel of all kinds, the opening of additional offices in Kennewick and Richland, additional newsprint, which at the time was difficult to obtain. The plant and press were inadequate to handle the publication of a daily newspaper. Skilled mechanical workmen necessary for the expanded operation were not available locally and had to be recruited from all over the Pacific Northwest and even further afield. Distribution of the weekly Herald had been by mail from the single Pasco office and the conversion to a daily required the establishment of carrier organizations and offices in the three cities. And ever present was the need for sufficient capital to carry on the expanded operation.

Scott Publishing Company with great difficulty met and solved the problems. Personnel were recruited and trained, additional offices were opened, and in 1948, in the late summer, a larger press was obtained, together with a building in Kennewick to house it, and at that time the Tri-City Herald moved from Pasco to Kennewick. However, the newsprint problem and the problem with respect to sufficient working capital remained.

The defendant Howard W. Parish is a man who spent most of his life in the newspaper business, a substantial part of it in and around the Pacific Northwest. He has had experience in all phases of the newspaper business, but predominately in circulation and management. He formerly was publisher of the Seattle Star, a daily newspaper published in Seattle, Washington, until 1946, when it ceased publication. When the Seattle Star went out of business, Parish acquired a stock interest in The Craftsman Press, Inc., a large commercial printing establishment in Seattle and held the office of Secretary-Treasurer of that company.

Parish traveled throughout the State of Washington on business of The Craftsman Press, Inc., and became acquainted with the Tri-City area as a result of such travels. He acquired additional information concerning the Tri-City area by reading a report prepared by one Earl McCallum, an expert in the newspaper field with reference to the newspaper business in the Tri-City area. Furthermore, at some time prior to February, 1949, Scott Publishing Company had prepared a brochure advertising the Tri-City area and the Tri-City Herald which was to be used to attract national advertising. Because Scott Publishing Company was not equipped to print in color, and as the brochure was to be prepared in color, Scott Publishing Company had the printing done by The Craftsman Press, Inc., in Seattle, and Parish became familiar with the data contained in that brochure and likewise met Lee and Philip in connection with their newsprint problem and also in connection with the printing of the brochure in February, 1949. Parish also had acquired considerable information concerning the background of Lee and Philip and the Scott Publishing Company and the difficulties which they were encountering in the publication of the Tri-City Herald and particularly the financial problems with which they were faced.

As a result of all this information Parish became interested in getting into the newspaper business in the Tri-City area. He acquired the financial backing of several substantial businessmen in Seattle and in April or May of 1949, he telephoned Philip and asked if Scott Publishing Company was interested in selling the Tri-City Herald. Philip informed him that they might be interested in selling if a price could be agreed upon. At that time the Scott Publishing Company was very much in need of additional working capital and Philip and Lee arranged a meeting with Parish at which they hoped to interest Parish in the purchase of stock in the Scott Publishing Company, or possibly sell him the Tri-City Herald.

At the meeting Parish informed Lee and Philip that he was not interested in purchasing a minority interest, but stated he was interested in purchasing the controlling interest or the entire property. Lee and Philip set the price at $410,000 for the entire company which Parish considered too high and he offered $250,000 and no agreement was reached.

As stated before, Parish was aware of the tremendous possibilities of the Tri-City area. He was also familiar with the background of Lee and Philip, their inexperience in the newspaper business in contrast to his own wide experience in that business. He was likewise familiar with the constant financial problems which Scott Publishing Company was continuously struggling with, whereas he felt that he, through his associates, had ample financial backing, and because of all of these factors which seemed to weigh so heavily in his favor and against Philip and Lee, he believed there was a golden opportunity for him in the newspaper business in the Tri-City area. At the meeting with Lee and Philip, when the purchase of the Tri-City

Herald was discussed, Parish pointed out these things to Philip and Lee and stated that he would start a newspaper in the Tri-City area to compete with them and that they would end up by having to sell their newspaper to Parish at 5¢ on the dollar.

Thereafter, in August, 1949, the defendant Columbia Basin Publishers, Inc., was incorporated. The original incorporaters were Parish, the defendant James M. Bryce, who is Parish's son-in-law, and John X. Johnson, one of the Seattle businessmen associated with Parish, and who subsequently furnished the principal financial support of the Columbia Basin Publishers, Inc., in its early days, together with several other Seattle businessmen.

The Columbia Basin Publishers, Inc., commenced publication of the Pasco News, a weekly newspaper at Pasco in August, 1949. The circulation of the Pasco News was on a free distribution basis. The publication of the Pasco News on a weekly basis continued until November, 1949, when publication was stepped up to bi-weekly, and at that time acquisition of the facilities to publish a daily newspaper was commenced. As a weekly newspaper the Pasco News competed with the Tri-City Herald for advertising within the Tri-City area and particularly in Pasco. However, at no time before Columbia Basin Publishers, Inc., commenced publication of the daily Columbia Basin News, under the circumstances hereinafter set forth, had the Pasco News, either as a weekly or a bi-weekly, earned a profit.

Prior to August, 1949, members of the Typographical Union in the Tri-City area had been under the jurisdiction of the local Typographical Union at Walla Walla, Washington, which is some 50 miles away from the Tri-City area. Because of this distance, members of the Typographical Union in the Tri-City area desired to form their own local

and in August, 1949, the defendant Kennewick-Pasco Local 831 was chartered and affiliated with the International Typographical Union. At some time prior there had been a contract between the Typographical Union through the Walla Walla local with the predecessor of the Scott Publishing Company, but before Scott Publishing Company took over, that contract had expired and there was no contract concerning terms of employment between the Typographical Union and Scott Publishing Company.

After the formation and chartering of Local 831, and on December 2, 1949, Local 831 mailed notices to employers in the Tri-City area asking the commencement of collective bargaining negotiations. The employers notified were Scott Publishing Company, Columbia Basin Publishers, Inc., Husk Printing Company and Meverden Printing Company, the latter two being commercial job printing shops. Lee, on behalf of the Scott Publishing Company, because of his personal feeling toward Parish, declined to join with the other employers in the area in meeting with the negotiating committee of Local 831. Nevertheless, the other three employers in the area, after several meetings with the Scale Committee of Local 831, one of which was attended by one Art Schmidt, President of the Seattle Local of the International Typographical Union, and a Mr. Hudson of the Tacoma Local of the I.T.U., signed a contract fixing the scale for members of the I.T.U. at $90.00 a week for 38¾ hours work.

Originally the Union's demand was for $95.00 a week for 37½ hours work, which was the Seattle scale at that time, but this demand was compromised for the $90.00 figure and the 38¾ hours.

Thereafter, Local 831 commenced negotiations with Scott Publishing Company. Not getting anywhere with the

negotiations the Local Union requested assistance from the I.T.U. and special representatives of the President of the I.T.U., Whiting and Marvick, came into the area and participated in the negotiations. When the representatives of the I.T.U. appeared in the negotiations, Scott Publishing Company appealed to Pacific Northwest Newspaper Publishers Association for assistance in the negotiations and one D. S. Haines, Secretary of that Association, joined in the negotiations on behalf of Scott Publishing Company.

The union people took the position that the only thing they could accept from Scott Publishing Company was the same contract which they had secured from the other employers in the area. Scott Publishing Company felt it could not pay the scale of $90.00 a week for 38¾ hours of work and likewise felt that certain provisions of the contract which had been signed by the other employers were illegal and therefore that it could not execute such a contract. At that time the wages paid by the Scott Publishing Company were $80.00 a week for 40 hours work. While the raise to $90.00 a week, which the Union demanded, was somewhat higher than was then being paid in other comparable communities in the State of Washington, and the northwest, it was not an unreasonable demand for the Union to make upon Scott Publishing Company, particularly in view of the fact that the other employers in the area had agreed to such a wage. After having secured such a contract from the other employers, the Union could not in fairness to them have accepted anything less from Scott Publishing Company. There is no evidence that the other three employers did not enter such contract in good faith. As has been pointed out, Scott Publishing Company was given the opportunity to join with the other three employers in their negotiations with the Union, but had declined to do so, nor

was there anything unreasonable in the Union's insistence upon a written contract with Scott Publishing Company, particularly in view of the fact that two employees of Scott Publishing Company, who had been active in the organization of Local 831, were discharged without apparent reason.

It likewise appears that in refusing to accept such contract Scott Publishing Company was acting in good faith. At the time of the negotiations the Tri-City area was in a depressed economic situation and it did not appear to Scott Publishing Company that it could afford to give the demanded increase without becoming bankrupt. Furthermore, Scott Publishing Company was advised by Mr. Haines that certain provisions of the contract demanded were illegal and subsequent litigation, many years later, concerning like provisions in other contracts, indicate at least that Mr. Haines was not unreasonable in his belief. At any rate the Court finds that both the Union representatives and the Scott Publishing Company negotiated in good faith on both sides but were unable to reach an agreement.

When the negotiations broke down on March 3, 1950, a strike or lockout ensued. Whether the rupture of relations between the Scott Publishing Company and its employees is a strike or a lockout is not clear. The Local Union had taken a strike vote and had applied to the I.T.U. for strike sanction and had received the same. However, no date for a strike had been set and members of the Union on shift at the Scott Publishing Company, on the evening of March 3, 1950, on returning to work after lunch, found strangers performing their jobs. However, whether it was a strike or a lockout is immaterial in this case, because it is evident that whatever form it took there would have been a severance of relations between the employer and employees when they failed to reach an agreement.

Before the strike or lockout occurred, it had become apparent to Scott Publishing Company that no agreement could be reached with the Local Union, and Scott Publishing Company, with the assistance of Mr. Haines of the Publishers Association, arranged to recruit non-union employees to produce the Tri-City Herald under strike conditions. Likewise teletypesetter equipment was furnished by the Publishers Association which permitted production of the paper with fewer skilled employees. When the strike or lockout occurred, publication of the Tri-City Herald continued by these means.

The fact that it was almost certain there would be a strike or lockout involving the Tri-City Herald was common knowledge in the Tri-City area before it occurred. Parish, Bryce and their associates in the Columbia Basin Publishers, Inc., were likewise aware of the strong possibility of labor trouble for Scott Publishing Company and the Tri-City Herald. As has been pointed out, Parish and Bryce and Columbia Basin Publishers, Inc., moved into the Tri-City area with the intention of eventually publishing a daily newspaper in competition with the Tri-City Herald and as early as the preceding November, had acquired sufficient plant facilities and personnel for that purpose. Therefore, when it became apparent that a strike or lockout was imminent at the Tri-City Herald, all that remained to be done by Columbia Basin Publishers, Inc., in order to start publication of a daily newspaper, was to complete arrangements that had already been started for features, comics and so forth for a daily newspaper. These arrangements were completed and on March 14, 1950, 11 days after the strike or lockout at the Tri-City Herald commenced, Columbia Basin Publishers, Inc., commenced publication of the Columbia Basin News as a morning daily newspaper 5 days a week, and this was subsequently increased to 6 days.

Almost immediately after the strike or lockout started at the Tri-City Herald, Local 831 commenced strike activities against the Tri-City Herald. Picket lines were established, attempts were made to induce both readers and advertisers, of the Tri-City Herald to cease doing business with that paper, "Do Not Patronize" lists of merchants advertising in the Tri-City Herald were distributed, radio broadcasts were made; other unions in the area were induced, to discourage their memberships from patronizing the Tri-City Herald—in short all the traditional means of exerting pressure against an employer involved in a labor dispute with organized labor was engaged in.

With the appearance of the Columbia Basin News as a daily newspaper, a bitter competitive struggle commenced between the News and the Herald, and between the respective publishers, Columbia Basin Publishers, Inc., represented by Parish and Bryce, and Scott Publishing Company, represented by Lee and Philip. The News, being in the position of the newcomer and seeking to gain a foothold in the field against a thoroughly established paper (at that time circulation of the Herald was in excess of 12,000, and it had substantial amounts of local and national advertising) was required to undertake very expensive programs to build circulation. Circulation is the lifeblood of a newspaper because it is circulation that attracts advertising and it is from advertising that the principal revenue of a newspaper is derived. Special reduced subscription rates were offered, free distribution of the News over wide areas was accomplished, contests were run, delivery routes beyond the trading area of the Tri-City area were established, all in an effort to build circulation, and all of which was very costly, but very necessary and normal in the establishment of a new newspaper in an area occupied by an established paper.

The publishers of the News were likewise happy to take every advantage possible of the situation existing between Local 831 and the Tri-City Herald. The Union on the one hand was interested in exerting economic pressure against Scott Publishing Company by causing a loss of business and revenue in any and every way it could in order to force Scott Publishing Company to meet its demands for what it deemed a fair labor agreement, and Columbia Basin Publishers, Inc., was interested in gaining all the business of Scott Publishing Company it could in order to establish its newspaper, and the two cooperated, not with the common objective of eliminating Scott Publishing Company from the field, but each with its own separate purpose.

In the field of advertising Columbia Basin Publishers, Inc., at the beginning of the daily publication of the Columbia Basin News, established a rate card which proved to be unrealistic, and rates actually paid by advertisers during the year following commencement of the daily publication were generally below the rate indicated on the rate card. Because of the News' low circulation in the beginning, relative to the circulation of the Tri-City Herald, it could not expect to charge and receive the same rates that the Herald received with its wider circulation. Again in the field of advertising the publishers of the Columbia Basin News were only too happy to take any advantage they could of the efforts of Local 831 to induce advertisers not to do business with the Tri-City Herald.

It is these circumstances outlined above upon which plaintiff relies to establish a conspiracy on the part of Parish, Bryce and the Columbia Basin Publishers, Inc., to drive Scott Publishing Company and the Tri-City Herald out of the newspaper business in the Tri-City area and to establish a monopoly for the Columbia Basin Publishers,

Inc. There is no direct evidence of such a conspiracy and, of course, direct evidence is not needed. However, all of the evidence in the case up to this point, it seems to the Court, is at least as consistent with a reasonable good-faith attempt on the part of Parish to establish a competing newspaper in the Tri-City area as it is with the idea of a conspiracy to drive the Tri-City Herald out of business.

Parish saw and was attracted to the Tri-City area by the same rosy picture of the future of the area that attracted Lee and Philip. He likewise saw Lee and Philip as inexperienced novices in the newspaper business, unfinanced and overexpanded. He considered himself an expert in the business and believed he had sufficient financial backing to establish a competing newspaper. The evidence shows that the establishment of a newspaper against a monopoly newspaper in a given area is an expensive proposition under any circumstances. Parish realized this and believed he could establish such a paper at a cost of $500,000.00. To hold that the fact of one entering a business under these circumstances is evidence of a conspiracy to violate the anti-trust laws is to thwart the very purpose of those laws and turn them into instruments for the protection of monopolies. Of course, it must have occurred to Parish that in the event he were successful in establishing his newspaper in the area, the result might be that the Scott Publishing Company would be forced out of business, but that is a normal, natural, everyday occurrence when inexperienced, unfinanced people are forced to meet experienced, adequately financed competition. Parish's statements to Lee and Philip, at the time he attempted to buy the Tri-City Herald, rather than indicating a purpose to violate the anti-trust laws and create a monopoly for himself were rather simply a prediction of what Parish

believed would be the result of Lee and Philip attempting to compete with him in the newspaper business.

Plaintiff also relies on the circumstances of the Columbia Basin Publishers, Inc., contracting with the Local to pay higher wages at a time when it was losing money, the strike or lockout against the Tri-City Herald, Columbia Basin Publishers, Inc., going daily at that time, again when it was losing money, and the cooperation between Local 831 and Columbia Basin Publishers, Inc., as being evidence of the conspiracy charged against Parish, Bryce and Columbia Basin Publishers, Inc., and of the Local joining in that conspiracy. While all of these circumstances would be consistent with plaintiff's theory of conspiracy if it were proved, they are likewise just as consistent with proper, legal, independent purposes and intentions on the part of Parish, Bryce and Columbia Basin Publishers, Inc., on the one hand and Local 831 on the other.

There is no evidence that Parish or Bryce had anything to do with fixing the demands which Local 831 presented to publishers in the Tri-City area. Indeed, the evidence is that none of the Scale Committee or Officers of Local 831 were acquainted with Parish or Bryce at the time the demands were formulated. The demand for $95.00 for a 37½ hour week was fixed by the entire Union membership, and it was based upon the wages and hours then prevailing in Seattle. There is uncontradicted testimony, which the Court accepts, that normally and customarily in negotiations between typographical locals and employers in smaller communities the scale prevailing in metropolitan areas is interjected and discussed and bargained for by the local unions in the smaller communities, and is in some instances achieved. So, there was nothing unreasonable in the demands of Local 831.

Nor was there anything unreasonable or sinister in Columbia Basin Publishers, Inc., coming to terms with the Union. In the first place, the demand presented for $95.00 for a 37½ hour week was not met, but there was a compromise of $90.00 for 38¾ hours, so to that extent negotiations did take place. Perhaps, if Scott Publishing Company had chosen to join with the other employers in the area, including Columbia Basin Publishers, Inc., in negotiations with the Union, as it was invited to do, the presentation of such a united front by the employers would have resulted in further reducing the demands of the Union. Secondly, in view of Columbia Basin Publishers, Inc., and Parish's determination to get a daily newspaper started in the area, and their acceptance of the fact that they were bound to spend some considerable money in the process in any event, they no doubt considered it prudent in a business sense to come to terms with the Union in view of the highly unionized character of the area as shown by the evidence, and also in view of Parish's experience that newspapers usually fared badly in disputes with Unions.

The evidence shows that Parish used the strike or lockout at the Tri-City Herald as his signal to go into the daily publication of the Columbia Basin News. Again while this would be consistent with the purpose on the part of Parish to drive the Tri-City Herald oat of business and to establish a monopoly in violation of the anti-trust laws, it is equally consistent with the purpose of starting a newspaper with the bona fide intention of competing. Parish, Bryce and Columbia Basin Publishers, Inc., were in the area for the avowed purpose of starting a daily newspaper in competition with the Tri-City Herald. Though they were still losing money in their bi-weekly publication, when they saw their competitor with a strike or lockout on his hands,

it was the most natural thing in the world to choose that time to go daily, and it is also completely consistent with a bona fide attempt to establish a competing business enterprise.

As for the cooperation which was established between Local 831 and Columbia Basin Publishers, Inc., Parish and Bryce, that too was a perfectly natural result of the circumstances which existed at the time. Local 831 and its members understandably were delighted to have a fair newspaper started to compete with what they considered to be the unfair newspaper. Not only did it furnish employment for Local 831 members, but it furnished also an additional lever to be used in the Union's attempt to pry an agreement from the Tri-City Herald. The publishers of Columbia Basin News likewise welcomed any assistance they could obtain from Local 831 in their attempt to build circulation and advertising and to establish a daily newspaper. There was indeed cooperation between the two, but each acting for its own legal independent purpose.

After commencement of publication of the daily Columbia Basin News in March, 1950, and despite the assistance of labor unions in the area in furtherance of the strike or lockout against the Tri-City Herald, the losses of Columbia Basin Publishers, Inc., continued and increased. To some extent the losses were those normally to be expected in an attempt to establish a daily newspaper against existing competition. Not only was Columbia Basin News in competition circulation-wise with the Tri-City Herald, but because it was a morning daily newspaper, it encountered competition from metropolitan morning daily newspapers which were circulated in substantial numbers in the area, and this competition from the metropolitan papers was in part responsible for Columbia Basin News' high circula-

tion costs. It likewise appears from the record that the losses to some extent were the result of haphazard management. Parish, the experienced newspaper man, continued to reside in Seattle and continued his employment with The Craftsman Press, attempting to manage the Columbia Basin News from a distance. Later, in August of 1950, when an attorney for I.T.U. and Unitypo came to the area in connection with a loan, he reported that the minute book of Columbia Basin Publishers, Inc., was in proper form for the first few months, but had not thereafter been kept up, that Parish had no financial statement which he could submit; that no inventory of the physical properties had ever been made; that the books were in a most confused state; that it appeared that little or nothing had been entered since June of that year and that Parish had then in August put a new auditor in charge to try to bring some order out of the chaos existing.

Parish and his associates discovered that the Tri-City area was not the soft touch competition-wise that they had anticipated. Furthermore, the substantial financial backing which Parish had anticipated from his Seattle businessmen associates failed to materialize. The record shows that after their original investment, which was soon expended, that one John X. Johnson, a businessman of Seattle, was the only associate who contributed financial support to the Columbia Basin News, and his contributions were relatively small, two or three thousand dollars at a time in order to meet payrolls and other expenses, and even Johnson, prior to his death in July, 1950, was becoming reluctant to invest any more money in the venture.

By May of 1950, Parish inserted an ad in "Editor & Publisher," a trade journal, in an attempt to sell the Columbia Basin News, but without success. Later in that

summer, Bryce contacted Glenn Lee of Scott Publishing Company in an endeavor to interest him in purchasing the Columbia Basin News, again without success, although Lee went so far as to make an appraisal of the Columbia Basin News' plant. There was a subsequent meeting between Lee and Bryce, arranged by Dudley Brown, a Seattle newspaper man, at which Bryce attempted to sell the Columbia Basin News to Lee, but that attempt likewise resulted in failure when Bryce insisted that a condition of the sale would be that the contract between Columbia Basin Publishers, Inc., and the Local Union be honored.

These attempts to sell out are again not consistent with a purpose or intent to drive the Tri-City Herald out of business for the purpose of establishing a monopoly in the area.

The defendant International Typographical Union is a labor organization with its principal office in Indianapolis, Indiana, and having approximately 110,000 members in some 800 local unions throughout the United States and Canada, and as such is engaged in representing its members through local unions in their relationship with their employers. As part of its activities, it aids members engaged in a strike or lockout by granting funds to such members by way of special assistance and strike benefits. Funds are obtained through dues and assessments levied by the membership upon themselves.

The governing body of the I.T.U. is the Executive Council, consisting of the President, the first Vice-President, the second Vice-President, the third Vice-President and the Secretary-Treasurer. Such officers are elected by the membership every two years.

The defendants Woodruff Randolph, Don Hurd, Harold H. Clark, Charles M. Lyon and Joe Bailey were all members of the Executive Council during at least a part of the time

here involved. The defendant Walter D. Marvick is a special representative of the President of the International Typographical Union in the State of Washington.

Faced frequently with the situation where its members became involved in a strike or lockout with the publisher of the only newspaper in a given area, the I.T.U. adopted the policy of either establishing a paper of its own to compete with the monopoly publisher, or rendering financial assistance where needed to a publisher whom the I.T.U. considered friendly to establish or maintain a competing newspaper. In furtherance of this policy in 1946, the I.T.U. formed the defendant Unitypo, Inc., as a corporation under the laws of the State of New York. The members of the Board of Directors of Unitypo, Inc., are the members of the Executive Council of the I.T.U., except for one, because of the requirements of the New York law that at least one director of a New York corporation be a resident of New York. The stock of Unitypo, Inc., is held by the members of the Executive Council of the I.T.U. in trust for the membership, again with the exception of the qualifying share held by the New York director. Funds for the operation of Unitypo, Inc., are supplied by I.T.U. from its so-called defense fund which in turn is raised by assessments on the members of I.T.U.

Since its inception, Unitypo, Inc., has started newspapers in various cities in the United States and Canada, where members of the I.T.U. became engaged in a strike or lockout with a monopoly publisher. It has likewise rendered encouragement and financial assistance to publishers considered friendly and who were competing with the publisher with whom I.T.U. was engaged in a strike or lockout. Where Unitypo, Inc., establishes a newspaper, it has been its policy to sell it to an independent publisher whenever

the opportunity presents itself, and not to continue in the publishing business.

The defendant Howard Parish, from his experience in the newspaper business, was aware of the I.T.U. policy and Unitypo, Inc., and when the losses of the Columbia Basin News continued to mount and as financing became increasingly difficult to obtain, Parish obtained authority from the stockholders of Columbia Basin Publishers, Inc., to seek a loan of $25,000.00 from Unitypo, Inc. The resolution authorizing Parish on behalf of the Columbia Basin Publishers, Inc., to apply to Unitypo, Inc., for a loan was passed on June 15, 1950, but nothing was done to carry out the resolution until after the death of John X. Johnson in July, 1950.

In August, 1950, Parish called Unitypo, Inc., at Indianapolis, Indiana, by telephone requesting financial assistance. Upon receipt of the request one Clarence R. Martin, an attorney for Unitypo, Inc., and I.T.U., was sent into the State of Washington to investigate the situation. When Martin arrived in Seattle in August the financial situation of Columbia Basin News was critical. Martin arranged for an immediate $10,000.00 loan in the following manner through the Seattle First National Bank: the bank agreed to lend the $10,000.00 upon receipt of a note and chattel mortgage upon the Columbia Basin News' plant, which was immediately endorsed by the bank and assigned to Unitypo, Inc., which then reimbursed the bank. The assignment to Unitypo, Inc., of the note and chattel mortgage was not recorded. The reason for this round about way of getting the money from Unitypo, Inc., to Columbia Basin Publishers, Inc., and the secrecy which surrounded all transactions between Unitypo, Inc., and Columbia Basin Publishers, Inc., was the prior experience of Unitypo, Inc.,

and I.T.U. around the country of having the newspaper they sought to aid encounter advertisers' resistance when it became known that the Union was supporting the paper.

The losses continued and the $10,000.00 was soon expended and it became necessary to seek another loan from Unitypo, Inc., at that time Unitypo, Inc., sent a man out to the Tri-City area to appraise the plant and equipment of Columbia Basin News and Unitypo, Inc., agreed to purchase the plant and equipment for $25,000.00, which included the prior $10,000.00 loan, and lease it back to Columbia Basin Publishers, Inc., with an option to repurchase. This transaction was consummated on October 2, 1950. By November, 1950, Columbia Basin Publishers, Inc., was again in need of money and sought an additional loan from Unitypo, Inc. On November 30, 1950, Unitypo, Inc., made an additional $25,000.00 loan, and took as security a pledge of all the stock of Columbia Basin Publishers, Inc. Losses continued and Unitypo, Inc., again in February, 1951, made an additional loan secured by the stock of Columbia Basin Publishers, Inc., and thereafter continued to make unsecured loans to Columbia Basin Publishers, Inc., and by 1954, the indebtedness of Columbia Basin Publishers, Inc., to Unitypo, Inc., had reached almost one-half million dollars. At that time Unitypo, Inc., made demand for payment of the loans made in 1950 and 1951, for which the stock of Columbia Basin Publishers, Inc., had been pledged as security, or in the alternative that the stock be issued to Unitypo, Inc. This latter was done, but Unitypo, Inc., almost immediately transferred the stock to Parish and Bryce, who in turn redeposited the stock with Unitypo, Inc., endorsed in blank as security for the then outstanding loans. The stock still stands in the name of Parish and Bryce on the records of the corporation.

Still the losses continued and by December 31, 1958, the indebtedness of Columbia Basin Publishers, Inc., to Unitypo, Inc., had reached $1,178,000.00. In addition, in 1952, Unitypo, Inc., caused to be organized the defendant Howard Parish and Associates, Inc., as a Washington corporation and provided the financing to this corporation to enable it to purchase and remodel a building which was thereafter leased and used as a plant and office by Columbia Basin Publishers, Inc. All of the stock of Howard Parish and Associates, Inc., except for qualifying shares, was held by Unitypo, Inc.

The overall management of Columbia Basin News was conducted through the years by Howard Parish until December 31, 1958. At that time the I.T.U. replaced Parish as manager of Columbia Basin News with Edward Byrne, who had formerly been publisher of I.T.U. and Unitypo, Inc., papers at Colorado Springs, Colorado, and Jamestown, New York. At the same time James Bryce and Charles Parker, who had been one of the original incorporators, resigned as directors and officers of Columbia Basin Publishers, Inc., and were succeeded by Byrne as Vice-President and director, and Frank Cummings as Secretary-Treasurer and director. Frank Cummings is also Secretary-Treasurer of Local 831 of I.T.U. Parish still remains as a director, but has nothing to do with the management and Columbia Basin News has in effect become an I.T.U. operated paper. Funds for the operation of the News are supplied by the I.T.U. in the form of special strike assistance to Local 831, which in turn delivers the funds to the Columbia Basin News. Since I.T.U. has taken over the management of the Columbia Basin News the amount of the losses has decreased, but nevertheless the newspaper continues to operate at a loss. From January 1, 1959, up to the date

of trial, the deficits in the operation of the Columbia Basin News, which have been made up by the I.T.U. through special assistane to Local 831, total $40,000.00.

In the years after Unitypo, Inc., commenced financing Columbia Basin News, Parish and Bryce wrote many letters and reports to the Board of Directors of Unitypo, Inc., and the Executive Council of the I.T.U., reporting on the progress of Columbia Basin News and containing references to "driving Lee and the Scott Publishing Company to the wall," "forcing a merger," "beating Lee," and so on. Plaintiff regards these letters and reports as showing an intent and purpose on the part of Parish and Bryce to drive the Tri-City Herald out of business in order to create a monopoly for the Columbia Basin News, and as a communication of such intent to the I.T.U. and Unitypo, Inc. While again such communications would be consistent with such a purpose, if the purpose was otherwise shown to exist, they appear to the Court to be merely communications on the part of Parish and Bryce in the nature of a sales pitch to their financial angel in an effort to keep the money coming, and were no doubt received in that spirit by the I.T.U. and Unitypo, Inc. Because of the policy of I.T.U. above referred to, and the purposes for which Unitypo, Inc., was created, it is unlikely that such sales pitches were required in order to retain the financial support of the Columbia Basin News by Unitypo, Inc. The record shows that in other areas throughout the United States and Canada I.T.U. and Unitypo, Inc., have expended considerable sums for the purpose of keeping a competing newspaper in operation.

A further indication of the lack of the intent and purpose on the part of Parish, Bryce and Columbia Basin News on the one hand and Unitypo, Inc., and I.T.U. on the

other to destroy the Tri-City Herald so as to create a monopoly for Columbia Basin News, lies in the method in which the money was expended. While the $1,178,000.00 that has been spent by Unitypo, Inc., in support of the Columbia Basin News up to January 1, 1959, is a considerable amount of money, it was expended over a period of almost nine years in amounts sufficient to meet the operating deficits as they occurred. It would seem that if there was a purpose and intent to drive the Tri-City Herald out of the business and such a large amount of money was available for that purpose, success would be much more likely to be achieved by spending the money in a relatively short time to cut subscription rates and circulation rates to such a point that the Tri-City Herald would have been unable to compete.

Another indication of the absence of such intent, particularly on the part of I.T.U. and Unitypo, Inc., lies in the fact that when Clarence Martin, the I.T.U. attorney, initially came to the area to investigate the situation, he reported to the I.T.U. and Unitypo, Inc., "Parish does not believe he has Lee worn down enough yet to buy him out at a reasonable price, but is encouraged by Lee's having asked Bryce for a conference. (Lee probably wants to buy out the Columbia Basin News, but apparently neither Lee nor Parish can get money enough together to buy out the other)." Despite the tremendous financial resources of I.T.U. and Unitypo, Inc., no offer was ever made to furnish Parish or Columbia Basin News or anyone else with sufficient funds to buy out the Tri-City Herald, nor was a request for such ever made by Parish, Bryce or Columbia Basin News. Had the purpose and intent to create a monopoly in the area existed, it could have been realized by

the purchase of the Tri-City Herald at a considerably lower figure than has been expended to date.

Likewise significant as to the intent and purpose of Unitypo, Inc., and I.T.U. was the question which was put to the Board of Directors and Executive Council each time they were requested to vote upon another loan for Columbia Basin News, which was in effect "shall we advance additional money to continue publication of the Columbia Basin News?"

The record also shows that periodically through the years, notices were sent by the Local Union of the I.T.U. to the Tri-City Herald offering to resume negotiations. Again such offers are not consistent with an intent to drive the Tri-City Herald out of business, because at any time Scott Publishing Company could have entered a contract with the Local Union and any damage being done to it competitive-wise, by virtue of the strike or lockout, would have come to an end.

In view of all these circumstances, the Court finds that the intent and purpose of Unitypo, Inc., and I.T.U., in first assisting financially the Columbia Basin News and later taking over its publication, was simply to keep in operation in the Tri-City area a newspaper to compete with the Tri-City Herald, and was not to drive the Tri-City Herald out of business for the purpose of establishing a monopoly. The Court further finds that the purpose and intent of Parish, Bryce and Columbia Basin Publishers, Inc., at all times was to establish a newspaper in competition with the Tri-City Herald, and that accepting whatever financial assistance Unitypo, Inc., or I.T.U. were willing to furnish is not inconsistent with that intent and purpose.

When Columbia Basin News commenced daily publication after the strike or lockout against Tri-City Herald

began, a very bitter competitive struggle developed between the News and the Herald. As has been mentioned, the management of Columbia Basin News was very inept to say the least, whether because Parish, with all his experience in the newspaper business regarded Lee and Philip, the guiding lights of Scott Publishing Company, as unworthy competitors or otherwise, does not appear. In any event advertising rates were set and a rate card published which proved to be totally unrealistic considered in the light of the circulation of the Columbia Basin News. As a result it was found necessary to sell advertising at rates that were generally below those on the published rate card. Such rates, while lower than those advertised on the rate card, were not unreasonably low as compared to the advertising rates of Tri-City Herald when the circulation of the two newspapers was considered. Despite the fact that the rates initially established proved to be unrealistic, it was not until March 1, 1951, that the management of Columbia Basin News revised its rate cards and established rates more in accordance with reality. Thereafter the rates charged advertisers did not substantially deviate from the rates published on the rate card. Newspaper advertising rates are based on the amount of advertising done by the advertiser, the more advertising inches used, the lower is the rate per inch. After the establishment of the March 1, 1951, rate card, the only sales of advertising to advertisers at a rate lower than the minimum rate shown on the rate card were to advertisers using more space than the maximum shown on the rate card and the reduction was relatively the same based on inches used as shown on the rate card.

In January, 1952, Columbia Basin Publishers, Inc., commenced the publication of a weekly free distribution news-

paper known as the Columbia Basin News' Shopper. The Shopper contained little else other than advertising, but did have some editorial content. By the Shopper, Columbia Basin News attempted to provide blanket coverage of the area, that is they endeavored to see that every home in the Tri-Cities received either the News or The Shopper, and combination advertising in the News and the Shopper was sold upon that basis. The publication of such a free distribution advertising edition is not uncommon in the newspaper business.

C. C. Anderson Company, one of a national chain of stores, was the largest single advertiser in the area. Because of personal differences between the then manager of the C. C. Anderson store and Glenn Lee, the publisher of the Tri-City Herald, so long as there was another daily newspaper in the area, the manager of C. C. Anderson would not have placed any advertising in the Tri-City Herald and would have advertised in any event in the Columbia Basin News exclusively. Because the C. C. Anderson advertising was placed generally on Fridays and resulted in an unbalanced daily page production for the Columbia Basin News, Columbia Basin Publishers, Inc., agreed to give C. C. Anderson five years of free advertising in the Shopper in consideration of Anderson's advertising in the Columbia Basin News being spread over five days, and in consideration of the fact that C. C. Anderson was the largest single advertiser in the Columbia Basin News.

In any event the Court finds that none of the rates charged any advertiser by Columbia Basin News were unreasonably low as compared to the rates charged advertisers by the Tri-City Herald when considered in the light of the relative circulation of the two newspapers.

Another practice engaged in by Columbia Basin News, with respect to national cooperative advertising is com-

plained of by plaintiff. In cooperative advertising, a national advertiser, either a manufacturer or distributor of a given product, will cooperate with a local retailer in local advertising. An advertisement will be inserted in a local newspaper advertising the product and the manufacturer or distributor will reimburse the local retailer who inserts the ad for a portion of the cost of the ad. In cooperative advertising Columbia Basin would issue double bills, one bill to the local retail merchant at his contract rate, based on the number of inches of advertising that he used in the Columbia Basin News, and this was the bill which the local retail advertiser would actually pay to Columbia Basin News. Columbia Basin News issue a second bill to the local merchant to be submitted to the national advertiser for reimbursement at the open rate which in most instances would be higher than the local merchant's contract rate. In this way the local merchant would receive reimbursement for a higher proportion of the bill for the given ad than the national advertiser had agreed to pay.

However, as has been pointed out, there was a bitter competitive struggle between the Columbia Basin News and the Tri-City Herald. Almost all of the devices, including the cooperative advertising practice, the publication of the Columbia Basin News' Shopper, the giving of more favorable rates to larger advertisers, and the free distribution of newspapers, used by Columbia Basin News in this competitive struggle and of which plaintiff complains, were at one time or another throughout the period here in question used by the Tri-City Herald in this competitive struggle. In addition, Tri-City Herald used devices such as rebates to advertisers and payments of commissions to local advertising agencies on local display advertising to attract advertising, which were not used by Columbia Basin

News. Plaintiff concedes that it engaged in some of the same practices as Columbia Basin News, but contends it has not done so to the same extent. The record bears this out, but it must be remembered that Columbia Basin News was in the position of the challenger seeking to become established in the field as against Tri-City Herald, already thoroughly established. Mention is made of the practices engaged in by the Tri-City Herald in the struggle, not because these practices would constitute a defense to Columbia Basin News' practices if they constituted a violation of the law, but merely to point up the fact that there was a bitter competitive struggle going on and that whatever was done by either party in that struggle was done for the purpose of competing and not pursuant to a conspiracy to monopolize.

Immediately after the strike or lockout commenced at Tri-City Herald and Columbia Basin News went daily, the Tri-City Herald lost both advertising and circulation revenue. When the strike started, Tri-City Herald's costs increased by virtue of the high wages and overtime paid to the non-union labor imported to keep the paper in publication when the regular employees ceased their employment. However, as employees were trained and as the equipment which they had brought in was utilized, their costs returned to normal and below what they had been before the strike commenced. By September, 1950, cuts, which personnel who had remained on the job had voluntarily taken because of the financial problem created by the strike or lockout, were restored; and raises were granted officers the following year and the financial condition of the Tri-City Herald and Scott Publishing Company has continued to improve. Their growth has not been as rapid as it otherwise would have been, but any slowing of its growth has been due to the strike or lockout and also due to the competition

afforded by Columbia Basin News and not to any conspiracy on the part of these defendants or any of them to drive the Tri-City Herald and Scott Publishing Company out of business and monopolize the newspaper publishing business in the Tri-City area. At any rate, the Tri-City Herald at all times material has been and continues to be the dominant newspaper in the Tri-City area.

No advertising was sold in the Columbia Basin News or the Columbia Basin News Shopper, and no rates for advertising in either or both were fixed, upon any understanding or agreement that the advertiser would not advertise in the Tri-City Herald or any other advertising media in the area.

The advertising and subscription rates of Columbia Basin News were not established at a level where they would tend to operate as a means or method to achieve a monopoly by excluding the Tri-City Herald from the newspaper publishing business in the Tri-City area and there was no intent on the part of the defendants, either individually or in combination to so exclude the Tri-City Herald from the newspaper publishing business in the Tri-City area.

Section 1 of the Sherman Act (15 U.S.C. 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal; * * *."

Section 2 of the Sherman Act (15 U.S.C. 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor.* * *."

Before there is a violation of these sections, there must be a contract, combination or conspiracy in restraint of trade, or a monopoly, or an attempt to monopolize or a combination or conspiracy to monopolize. If an actual restraint of trade results from a combination, or if monopoly is achieved by an individual acting alone or in combination with others, the intent is immaterial, or may be inferred. U. S. v. Patten, 226 U. S. 525; U. S. v. Masonite Corp., 316 U. S. 265, 275; U. S. v. Griffith, 334 U. S. 100; U. S. v. Columbia Steel Co., et al, 334 U.S. 495. However, where no restraint of trade or monopoly results from the acts and conduct complained of, then the acts or conduct complained of must be accompanied by a specific intent to restrain trade or monopolize before there is a violation of Sections 1 or 2. Swift & Co. v. U. S., 196 U. S. 375, 396. U. S. v. Columbia Steel Co., et al, supra, at 525.

In this case, the evidence does not show either an actual restraint of trade or monopoly, or the specific intent on the part of any of the defendants, either individually or in combination, to restrain trade or create a monopoly in the daily newspaper business in the Tri-City area.

Plaintiff also alleges violations of Section 2(a) of the Robinson-Patman Act (15 U.S.C. 13(a)), and Section 3 of the Clayton Act (15 U.S.C. 14), by defendants in the sale of advertising.

Section 2(a) of the Robinson-Patman Act prohibits discrimination in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Section 3 of the Clayton Act makes it unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, for use, consumption or resale within the United States or any place within the jurisdiction of the United States, or fix a price charged therefore [sic] or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares or merchandise, machinery, supplies or other commodities of a competitor of the lessor or seller, where the effect of such lease, sale, or contract for sale may be to substantially lessen competition or tend to create a monopoly.

While there is considerable doubt in the Court's mind whether newspaper advertising is a "commodity" within the meaning of the Robinson-Patman Act, or "goods, wares, merchandise or other commodity" within the meaning of the Clayton Act, decision of that question is unnecessary in this case in view of the Court's finding that there were no price discriminations by Columbia Basin News in the sale of advertising which had the effect of lessening competition or tended to create a monopoly or injure, destroy or prevent competition; and that there were no sales of advertising, or prices fixed for advertising, upon any agreement or understanding that the purchaser would not advertise in the Tri-City Herald.

It is the conclusion of the Court that plaintiff shall recover nothing in this action and that judgment shall be entered in favor of defendants for their costs. This opinion constitutes the Court's findings of fact and conclusions of law in this case, and counsel for defendants are directed to prepare, serve on counsel for plaintiff, and lodge with the

Clerk a form of judgment in accordance with this opinion, within 15 days from date of receipt of a copy of this opinion, and counsel for plaintiff is granted 15 days after service upon it of such form of judgment within which to lodge with the Clerk in writing any objections which it may have to the form of such judgment.

Dated this 2nd day of December, 1959.

s W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed December 4, 1959.

APPENDIX C

United States Court of Appeals
for the Ninth Circuit

No. 16,871

Scott Publishing Co., Inc.,
Appellant,

vs.

Columbia Basin Publishers, Inc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment Filed and entered June 30, 1961 Frank H. Schmid, Clerk.

APPENDIX D

United States Court of Appeals for the Ninth Circuit

Excerpt from proceedings of Monday, August 28, 1961
Before: Hamley, Hamlin and Merrill, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court,
It Is Ordered that the petition of the appellant filed August 14, 1961 and within time allowed therefor by rule of court, for a rehearing of the above cause be, and hereby is, denied.

APPENDIX E

Section 1. Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U. S. Code, Sec. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

Section 2. Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U. S. Code, Sec. 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4. Clayton Act

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides

or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 2. Clayton Act

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.

§ 13(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

APPENDIX F

Summary of Exhibits Relating to Price Discrimination

Among the exhibits conclusively establishing price discriminations by the Columbia Basin News are the following:*

(1) Plaintiff's Exhibit 270 is a summary of the advertising rates paid by 21 selected advertisers in the Columbia Basin News, together with the total number of column inches used by those advertisers during the year (Tr. 2621-31). A study of the first two sheets of this exhibit shows that there were vast price discrepancies even as among these 21 selected advertisers, all of whom were especially favored by the Columbia Basin News. For example, in the year 1952, Carl's paid an average rate of only 56½¢ (using 3,035½ column inches), whereas Washington Hardware and Furniture Company, using approximately the same amount of space (3,042 column inches) paid an average of 69 9/10¢ per inch.† The same type of discrimination among the 21 selected advertisers advertising in the weekly Shopper is revealed by page 2 of the exhibit summary.

(2) Plaintiff's Exhibit 271 summarizes the special rates received by the 21 preferred advertisers for each of the years 1950 to 1955 (Tr. 2631-34). This exhibit again demonstrates that even among the 21 preferred advertisers there were price discriminations which the defendants made no attempt to justify. These discriminations, as shown both in Exhibits 270 and 271, extend throughout the years 1951, 1952, 1953, 1954 and 1955 in direct conflict to the finding of the court (R. 166).

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*The exhibits described below are based upon the records of the Columbia Basin News.

†The rate card effective January 1, 1952 (Pl. Ex. 159), sets up a rate of 71¢ for 3000 column inches with a contract, and 90¢ without a contract.

(3) Plaintiff's Exhibit 272 is a summary of all of the cash discounts given by the Columbia Basin News in the period August 1, 1950 to December 22, 1955 (Tr. 2634-41). This document reveals the numerous secret rebates, varying from 10c to 15c to 19c per inch which were given by the News to various advertisers. For example, in January 1952, the applicable rate card (Pl. Ex. 159) provided for 2% as the discount for paying cash. But the summary of cash discounts (Pl. Ex. 272) reveals discounts during that month to favored advertisers of 10c, 15c, 19c and so forth. Such cash discounts reflect price discriminations in violation of the Robinson-Patman Act and are directly contrary to the court's finding that the rate cards were followed by the Columbia Basin News after March 1951. That such discount variations continued into 1955 (which was the last year for discovery on this type of material by the petitioner) is revealed by page 36, showing discounts ranging up to 10%.

(4) Plaintiff's Exhibits 273 through 291 are studies of the special price concessions granted to 19 selected advertisers during the period 1950 to 1955 (Tr. 2642-54). In each instance, the rate charged the particular favored advertiser is compared with the rate card which was used as the basis for many sales. In every instance there are widespread rate discriminations shown extending throughout the years 1950 to 1955. These exhibits leave no question of a violation of the Robinson-Patman Act by the Columbia Basin News.

(5) Plaintiff's Exhibits 292 to 302 are summaries of discriminating charges during certain months of the years 1950 to 1955 (Tr. 2657-77). These exhibits reveal irrefutable rate discriminations which were not explained by the respondents. For example, Plaintiff's Exhibit 299, a summary

of discriminations in the month of November, 1952, lists the various advertisers by the number of inches used during the month and shows that there is no correlation under any theory between amount of advertising used and the amount paid after discount. For example, Station KALE, using 462 inches, paid 90¢, where Carl's Mens Shop, using only 129 inches, paid 60¢. Respondents made a few minor corrections to this set of exhibits by showing that there were contracts in effect providing various special rates for certain of the advertisers, but these corrections, of course, could not and did not amount to any defense. Indeed, the existence of contracts merely demonstrates the mechanics by which the discriminating charges were placed in effect and memorialized. That the widespread price discriminations, among the 21 preferred advertisers as well as between the preferred and nonpreferred advertisers, continued into 1955 is revealed by Plaintiff's Exhibit 302. These statistical exhibits based upon the records of Columbia Basin News render the court's finding that there were no price discriminations clearly erroneous.

(6) The testimony and documentary evidence is uncontradicted that Columbia Basin News granted certain preferred advertisers package rates, *e.g.*, 75¢ for the first day, 25¢ for the second day, 25¢ for the third day, and so forth (Tr. 1305-06, 1312, 1321-22, Pl. Exs. 163, 162, 167). No attempt was made to justify these rate deviations.

(7) Various favored advertisers were granted free advertising in the Columbia Basin News Shopper, *e.g.*, C. C. Anderson, Davis Furniture, J. C. Penney's, and Carl's (Pl. Exs. 119, 308), whereas other advertisers were required to pay the rates charged on the Columbia Basin News rate card (Pl. Exs. 23, 145, 147, 148, 149, 150, 154, 155, 156, 159). Extensive rate deviations in the Shopper

took place in the years 1952 and 1953 (Pl. Ex. 308, Tr. 1339-40), and some discriminatory prices continued at least until 1957 (Pl. Exs. 180, 270).

(8) Certain key employees of the Columbia Basin News, including Parish and Mast, the business manager, conceded price differences at various times in the record during the years after 1951 as to certain preferred advertisers such as C. C. Anderson, Tri-City Food Center, Sears Roebuck & Company, and Carl's Mens Shop (Tr. 1370-72, 5813-23, Pl. Exs. 172, 178, 273, 274, 297, 298, 299). Such concessions were forced by petitioner's introduction of the exhibits noted above, together with the contracts between the Columbia Basin News and various favored advertisers containing such rate discriminations (Pl. Exs. 172, 174, 175).